AN

ESSAY

ON

2793

THE LAW OF BAILMENTS.

BY

SIR WILLIAM JONES, KNT.

LATE ONE OF THE JUDGES OF THE SUPREME COURT OF JUDICATURE AT BENGAL.

In tutelis, societatibus, *ductis, mandatis*, rebus emptis-venditis, *conductis-locatis*, quibus vitæ societas continetur, magni est judicis statuere, (præsertim cum in plerisque sint judicia contraria,) *quid quemque cuique prastare* oporteat.

Q. SCÆVOLA, apud CIC. de Offic. lib. iii.

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NOTES, AND AN APPENDIX.

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ERRATUM.

Essay, p. 55, note (i.) for 3 Johns. R. read 4 Johns. R.

ADVERTISEMENT.

The reader is indebted to Judge Story's comprehensive Commentaries on the Law of Bailments for the substance of several notes with which the following pages are illustrated. That excellent work is now so justly appreciated abroad, as well as at home, that it has given occasion for a new edition of Sir William Jones' Essay in London, in which copious extracts are made from the American Treatise and due praise awarded to its author.

The importance of the topic as a branch of the general subject of Bailments, has induced the publishers to subjoin in the form of an Appendix, Mr. Nichols' note on the Law of Carriers which has elsewhere appeared in a very uncouth and unwieldy shape. It was intended to render it more complete by the addition of all the appropriate American authorities, but the intention has, in a measure, been defeated by the necessarily limited size of the present volume. The more important only of those authorities have in consequence been retained.

Philadelphia, Dec. 1835.

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ESSAY

ON THE

LAW OF BAILMENTS.

HAVING lately had occasion to examine with some attention the nature and properties of that contract which lawyers call *bailment*, or *a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered* (1), I could not but observe with surprise, that a title in our English law which seems the most generally interesting, should be the least generally un-

(1) It has been observed, that both Sir W. Jones's definitions of a bailment (see the other, p. 117) are redundant and inaccurate. Both suppose that the goods bailed are to be restored or re-delivered. But, in a bailment for sale, as upon a consignment to a factor, no re-delivery is contemplated. (Sed. vid. 2 Kent's Comm. 2 ed. p. 559. n. 1.) In some cases, the bailee is not entitled to use the thing bailed; in others, his being entitled to use it is of the essence of the contract. Objection also has been made to Mr. Justice Blackstone's definitions of bailment (see 2 Bla. Comm. 395, 451,) as "a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be *faithfully* executed;" and as "a delivery of goods to another person for a particular *use*." More properly, a bailment is a delivery of a thing for some special object or purpose, upon a contract, express or implied, to conform to that object or purpose. (Story, Comm. on the Law of Bailments, 2.) According to Mr. Chancellor Kent, a bailment is a delivery of goods in trust, upon a contract express or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered. 2 Comm. 559.

derstood, and the least precisely ascertained. Hundreds and thousands of men pass through life without knowing or caring to know any of the numberless niceties which attend our abstruse, though elegant, system of real property, and without being at all ac-
[2] quainted with that exquisite logic on which our rules of special pleading are founded: but there is hardly a man of any age or station who does not every week, and almost every day, contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depositary* or a person *depositing*, of a *commissioner* or an *employer*, of a *receiver* or a *giver in pledge;* and, what can be more absurd, as well as more dangerous, than frequently to be bound by duties without knowing the nature or extent of them, and to enjoy rights of which we have no just idea? Nor must it ever be forgotten that the contracts above mentioned are among the principal springs and wheels of civil society; that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It seems, therefore, astonishing that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of Elizabeth to the reign of Anne, the doctrine of bailments should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argu-
[3] ment, than any other part perhaps, of juridical learning; at least, than any other part equally simple.

Such being the case, I could not help imagining that a short and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of English law; especially as our excellent Blackstone, who of all men was best able to throw the clearest light on this as on every other subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may safely pronounce the least satisfactory part of it; for, he represents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of *a distinct species;* he says nothing of employment by *commission;* he introduces the doctrine of a *distress*, which has an analogy to a *pawn*, but is not properly *bailed;* and, on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words.(*a*) His commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the [4] the world, how accurately and elegantly soever it may be delineated, will make a geographer; if, indeed, all the titles which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope, at length, to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work which every

(*a*) 2 Comm. 452, 453, 454.

lover of humanity and peace must anxiously wish to see accomplished. The following essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary, in the Commentaries on the Laws of England.

Subject proposed.

I propose to begin with treating the subject analytically, and having traced every part of it up to the first principles of natural reason, shall proceed historically to show with what perfect harmony those principles are recognized and established by other nations, especially the Romans, as well as by our English courts, when their decisions are properly understood and clearly distinguished; after which I shall resume synthetically the whole learning of bailments, and expound such rules as, in my humble apprehension, will prevent any further perplexity on this interesting title, except in cases very peculiarly circumstanced.

[5]

I. Analysis.

From the obligation contained in the definition of bailment, *to restore the thing bailed at a certain time*,(2) it follows that the bailee must *keep* it, and be *responsible* to the bailor *if it be lost or damaged:* but, as the bounds of justice would in most cases be transgressed, if he were made answerable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment:* and the investigation of this *degree* in every particular contract is the problem which involves the principal difficulty.

There are infinite shades of care or diligence, from the slightest momentary thought or transient glance of

(2) It is almost too trivial to be noticed, that a new condition is here introduced into the definition of a bailment, and one which, in this place at least, is irrelevant; for, from the obligation to restore, considered abstractedly, and apart from any limitation in point of time, the obligation to keep and to answer for loss or damage follows.

attention, to the most vigilant anxiety and solicitude; but extremes in this case, as in most others, are inapplicable to practice: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees, then, of care for which we are seeking, must lie somewhere between these extremes; and, by observing the different manners and characters of men, we may find a certain standard which will greatly facilitate our inquiry: for, although some are excessively careless, and others excessively vigilant, and some through life, others only [6] at particular times, yet we may perceive that the generality of rational men use nearly the same degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every person of common prudence and capable of governing a family* takes of *his own* concerns,(3) is a proper measure of that which would

(3) Or rather, as Mr. Justice Story expresses it, the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them. (vid. Tompkins *v.* Saltmarsh, 14 Serg. & R. 280.) The variable character of the standard of diligence is illustrated by Judge Story in the following manner. "In one country or in one age," says he, "acts may be deemed negligent, which, at another time, or in another country, may be justly deemed an exercise of ordinary diligence; and it is important to attend to this consideration, not merely to deduce the *implied* obligations of a party in a given case, but also to possess ourselves of the true measure by which to fix the application of the general rule. Thus, in times of primitive or pastoral simplicity, when it was customary to leave flocks to roam at large by night, it would not be a want of ordinary diligence to allow a neighbour's flock, which is deposited with us, to roam in the same manner. But, if the general custom were, at night, to pen them in a fold, it would doubtless be a want of such diligence, not to do the same with them. In many parts of our country, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is quite usual to leave barns, in which horses and other cattle are kept, without being locked by night. But, in cities, where the danger is much greater, and the

uniformly be required in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less*, degree of attention. Here, then, we may fix a constant determinate point, on each side of which there is a series consisting of variable terms tending indefinitely towards the abovementioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be *favourable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the measure will be that care which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that attention which a man *remarkably exact and thoughtful* gives to the securing of his personal property.

The fixed mode or standard of diligence I shall, for want of an apter epithet, invariably call *ordinary;* although that word is equivocal, and sometimes involves a notion of degradation which I mean wholly to exclude; but the unvaried use of the word in one

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temptations more pressing, it would be deemed a great want of caution to do the same. If a man were to leave his friend's horse in his field, or in his barn, all night, in many country towns, and the horse were stolen, it would not be imagined that any responsibility was incurred. But if, in a large city, the same want of precaution were shown, it would be deemed, in many cases, gross neglect.

"In short, diligence is usually proportioned to the degree of danger of loss, and that danger is, in different states of society, compounded of very different elements. What constitutes ordinary diligence may also be materially affected by the nature, bulk, and value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of dollars. The value, especially, is an ingredient to be taken into consideration upon every question of negligence; for, that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of a common parcel, would not be so." (Story 8–11. Batson *v.* Donovan, 4 B. & Ald. 21. 2 Kent's Comm. 561. Bodenham *v.* Bennet, 4 Price 31. Bailey, J. in Sleat *v.* Fagg, 5 B. & Ald. 348.

sense will prevent the least obscurity. The degrees [7]
on each side of the standard being indeterminate, need not be distinguished by any precise denomination; the first may be called *less*, and the second *more than ordinary* diligence.

Superlatives are exactly true in mathematics; they approach the truth in abstract morality; but, in practice and actual life, they are commonly false: they are often, indeed, used for mere intensives, as *the most* diligent for *very* diligent; but this is a rhetorical figure; and, as rhetoric, like her sister, poetry, delights in fiction, her language ought never to be adopted in sober investigations of truth; for this reason, I would reject from the present inquiry all such expressions as *the utmost care*, *all possible* or *all imaginable diligence*, and the like, which have been the cause of many errors in the code of ancient Rome, whence, as it will soon be demonstrated, they have been introduced into our books even of high authority.

Just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus, the omission of that care *which every prudent man takes of his own property*, is the determinate point of negligence, on each side of which is a series of variable modes of [8]
default infinitely diminishing in proportion as their opposite modes of care infinitely increase; for, the want of extremely great care is an extremely little fault, and the want of the slightest attention is so considerable a fault that it almost changes its nature, and

nearly becomes in theory, as it exactly does in practice, a breach of trust, and a deviation from common honesty. This known or fixed point of negligence is therefore a mean between *fraud* and *accident;* and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as *a man of common sense, however inattentive,*(4) and of such as a *very cautious and vigilant* man, respectively, take of *their own possessions.*

The constant or fixed mode of default I likewise call *ordinary*, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense: of the two variable modes, the first may be called *greater*, and the second *less*, than ordinary;
[9] or, the first *gross*, and the other *slight* neglect.

It is obvious that a bailee of common honesty, if he also have common prudence, would not be *more* negligent than ordinary in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the

(4) Perhaps the measure is expressed here a little too loosely. It is rather to be drawn from the diligence which men habitually careless, or of little prudence, (not "however inattentive" they may be,) generally take of their own concerns (Story 12.)

subject, that infinite degrees of *fraud* may be conceived, increasing in a series from the term where *gross neglect* ends, to a term where positive *crime* begins; as *crimes* likewise proceed gradually from the lightest to the most atrocious; and, in the same manner, there are infinite degrees of *accident*, from the limit of extremely slight neglect, to a *force irresistible* by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities; but it does not follow that *neglect*, *deceit*, and *accident* are to be considered as indivisible points, and that *no degrees whatever* on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of *diligence* which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard; nothing more, therefore, ought in that case to be required than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect:* but it is very different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract. [10]

If the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than good faith were exacted from such a person, that is, if he were to be made answera-

ble for less than *gross* neglect, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired. (5)

On the other hand, *when the bailee alone is benefited or accommodated by his contract*, it is not only reasonable that he who receives the benefit should bear the burden, but, if he were not obliged to be *more than ordinarily* careful, and bound to answer even for *slight* neglect, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

[11] This distinction is conformable, not only to natural reason, but also, by a fair presumption, to the *intention of the parties*, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expressed*, the rule (as in devises) yields to it; and a bailee without benefit, may, by a special undertaking, make himself liable for *ordinary* or *slight* neglect, or even for inevitable *accident*: hence, as an agreement that a man may safely be dishonest is repugnant to decency and morality, and as no man shall be presumed to bind himself against irresistible force, it is a just rule that every bailee is responsible for *fraud*, even though the contrary be stipulated, but that no bailee is responsible for *accident*, unless it be most expressly so agreed.

II. The history. The plain elements of natural law on the subject of responsibility for neglect, having been traced by this

(5) Shiells *v.* Blackburne, 1 H. Bl. 162. Edson *v.* Weston, 7 Cowen R. 278.

short analysis, I come to the second, or historical part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the Romans and the English.

Jewish and Athenian law.

Of all known laws the most ancient and venerable are those of the Jews; and among the Mosaic institutions we have some curious rules on the very subject before us; but, as they are not numerous enough to compose a system, it will be sufficient to interweave [12] them as we go along, and explain them in their proper places; for a similar reason, I shall say nothing here of the Attic laws on this title, but shall proceed at once to that nation by which the wisdom of Athens was eclipsed, and her glory extinguished.

Roman law.

The decisions of the old Roman lawyers, collected and arranged in the sixth century by the order of Justinian, have been for ages, and in some degree still are, in bad odour among Englishmen: this is an honest prejudice, and flows from a laudable source; but a prejudice most certainly it is, and, like all others, may be carried to a culpable excess.

The constitution of Rome was originally excellent; but, when it was *settled*, as historians write, by Augustus, or, in truer words, when that base dissembler and cold-blooded assassin, C. Octavius, gave law to millions of honester, wiser, and braver men than himself, by the help of a profligate army and an abandoned senate, the new form of government was in itself absurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the state, both executive and legislative, was a tyrannous or-

dinance, with the name only, not the nature of a law: (*b*) had it even been voluntarily conceded, as it
[13] was in truth forcibly extorted, it could not have bound the *sons* of those who consented to it: for, "a renunciation of *personal* rights, especially rights of the highest nature, can have no operation beyond the *persons* of those who renounce them." Yet, iniquitous and odious as the settlement of the constitution was, Ulpian only spoke in conformity to it when he said that "the will of the prince had the force of law;" that is, as he afterwards explains himself, *in the Roman empire;* for, he neither meaned, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or sentence, ill understood and worse applied, to the minds of our early Norman kings, that some of them, according to Sir John Fortescue, "were not pleased with their own laws, but exerted themselves to introduce the civil laws of Rome into the government of England;" (*c*) and so hateful was it to our sturdy ancestors, that, if John of Salisbury be credited, "they burned and tore all such books of civil and canon law as fell into their hands: (*d*) but this was intemperate zeal; and it would have been sufficient to improbate the *public* or *constitutional* maxims of the Roman imperial law as absurd in themselves as well as inapplicable to our free government, without rejecting the whole system of *private* jurisprudence as incapable of answering even the purpose of illustration. Many *positive* institutions of the Romans are demonstrated by Fortescue, with great force, to

Distinction between the *private* and *public*, the *rational* and *positive* laws of Rome.

[14]

(*b*) D. 1. 4. 1.
(*c*) De Laud. Leg. Angl. c. 33 34.
(*d*) Seld. in Fort. c. 33.

be far surpassed in justice and sense by our own immemorial customs; and the rescripts of Severus or Caracalla, which were laws, it seems, at Rome, have certainly no kind of authority at Westminster; but, in questions of *rational* law, no cause can be assigned why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in Italy and in England, in the mind of a Papinian and of a Blackstone.

Without undertaking, therefore, in all instances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celsus or with himself, I shall proceed to exhibit a summary of the Roman law on the subject of *responsibility for neglect.*

Two famous laws of Ulpian.

The two great sources whence all the decisions of civilians on this matter must be derived, are two laws of Ulpian; the first of which is taken from his work on Sabinus, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension of their obvious [15] meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

"Some contracts," says the great writer on Sabinus, "make the party responsible for *deceit* only; some, both for *deceit and neglect.* Nothing more than responsibility for *deceit* is demanded in *deposits* and *possession at will;* both *deceit and neglect* are inhib-

ited in *commissions, lending for use, custody after sale, taking in pledge, hiring;* also *in portions, guardianships, voluntary work:* (among these *some* require even more than ordinary *diligence.*) *Partnership* and *undivided property* make the partner and joint-proprietor answerable for both *deceit and negligence.*(*e.*)

"In contracts," says the same author, in his other work, "we are sometimes responsible for *deceit alone;*
[16] sometimes for *neglect also;* for *deceit only* in *deposits,* because, since *no benefit* accrues to the depositary, he can justly be answerable for no more than *deceit;* but, if a *reward* happen to be given, then a responsibility for *neglect also* is required; or if it be agreed at the time of the contract, that the depositary shall answer both *neglect* and for *accident:* but, where *a benefit* accrues to *both* parties—as in *keeping a thing sold,* as in *hiring,* as in *portions,* as in *pledges,* as in *partnerships*—both *deceit and neglect* make the party liable. *Lending for use,* indeed, is for the most part *beneficial* to the *borrower only;* and for this reason, the better opinion is that of Q. Mucius, who thought, that *he* should be responsible not only for *neglect,* but even for the omission of more than ordinary *diligence.*"(*f*)

(*e*) Contractus quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantum depositum et precarium, dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum; item dotisdatio, tutelæ, negotia gesta; (in his quidam et diligentiam.) Societas et rerum communio et dolum et culpam recipit. D. 50. 17. 23.

(*f*) In contractibus interdum dolum solum, interdum et culpam, præstamus; dolum in deposito; nam quia nulla utilitas ejus versatur, apud quem deponitur, merito dolus præstatur solus; nisi forte et merces accessit, tunc enim, ut est et constitutum, etiam culpa exhibetur; aut, si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponitur; sed, ubi utriusque utilitas ver-

One would scarce have believed it possible that there could have been two opinions on laws so perspicuous and precise composed by the same writer, who was indubitably the best expositor of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the single passage extracted from the book on Sabinus has had no fewer than twelve particular commentaries in Latin, (*g*) one or two in Greek, (*h*) and some in the modern languages of Europe, besides the general expositions of that important part of the digest in which it is preserved. Most of these I have perused with more admiration of human sagacity and industry than either solid instruction or rational entertainment; for, these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themselves clear, than of elucidating passages which have any obscurity in the words or the sense of them. Campanus, indeed, who was both a lawyer and a poet, has turned the first law of Ulpian into Latin hexameters; and his authority, both in prose and verse, confirms the interpretation which I have just given. Critical remarks. [17] [18]

The chief causes of all this perplexity have been,

titur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus cui commodatur; et ideo verior est Q. Mucii sententia existimantis et culpam præstandam et diligentiam. D. 13. 6. 5. 2.

(*g*) Bocerus, Campanus, D'Avezan, Del Rio, Le Conte, Rittershusius, Giphanius, J. Godefroi, and others.

(*h*) The scholium on Harmenopulus, l. 6. tit de Reg. Jur. n. 55. may be considered as a commentary on this law.

first, the vague and indistinct manner in which the old Roman lawyers, even the most eminent, have written on the subject; secondly, the loose and equivocal sense of the words *diligentia* and *culpa;* lastly and principally, the darkness of the parenthetical clause, *in his quidam et diligentiam*, which has produced more doubt as to its true reading and signification than any sentence of equal length in any author, Greek or Latin. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the pandects, and the manuscripts from which they were printed, exhibit the reading above set forth; and it has accordingly been adopted by Cujas, P. Faber, Le Conte, Donellus, and most others, as giving a sense both perspicuous in itself and consistent with the second law; but the Florentine copy has *quidem*, and the copies from which the Basilica were translated centuries after Justinian, appear to have contained the same word, since the Greeks have rendered it by a particle of similar import. This variation in a single letter makes a total alteration in the whole doctrine of
[19] Ulpian; for, if it be agreed that *diligentia* means, by a figure of speech, *a more than ordinary degree of diligence*, the common reading will imply, conformably with the second law before cited, that "*some* of the preceding contracts demand that higher degree;" but the Florentine reading will denote, in contradiction to it, that "*all* of them require more than ordinary exertions."

It is by no means my design to depreciate the au-

thority of the venerable manuscript preserved at Florence; for, although few civilians, I believe, agree with Politian in supposing it to be one of the *originals* which were sent by Justinian himself to the principal towns of Italy,(*i*) yet it may *possibly* be the very book which the Emperor Lotharius II. is *said* to have found at Amalfi about the year 1130, and gave to the citizens of Pisa, from whom it was taken near three hundred years after by the Florentines, and has been kept by them with superstitious reverence:(*k*) be that as it may, the copy deserves the highest respect; but, if any proof be requisite that it is no *faultless* transcript, we may observe, that, in the very law before us, *accedunt* is erroneously written for *accidunt;* and the whole phrase, indeed, in which that word occurs, is different from the copy used by the Greek interpreters, and conveys a meaning, as Bocerus and others [20] have remarked, not supportable by any principle or analogy.

This, too, is indisputably clear, that the sentence, "in his *quidem* et diligentiam," is ungrammatical, and cannot be construed according to the interpretation which some contend for. What verb is understood? *Recipiunt.* What noun? *Contractus.* What then becomes of the words *in his*, namely *contractibus*, unless *in* signify *among?* And, in that case, the difference between *quidem* and *quidam* vanishes; for the clause may still import, that "among the preceding contracts (that is, *in some of them*,) more than usual diligence is exacted:" in this sense, the Greek preposition seems

(*i*) Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.
(*k*) Taurelli, Præf. ad Pand. Florent.

to have been taken by the scholiast on Harmenopulus; and it may here be mentioned, that *diligentia*, in the nominative, appears in some old copies as the Greeks have rendered it; but Accursius, Del Rio, and a few others, consider the word as implying no more than diligence *in general*, and distinguish it into various *degrees* applicable to the several contracts which Ulpian enumerates. We may add, that one or two interpreters thus explain the whole sentence, "in his *contractibus* quidam *jurisconsulti* et diligentiam *requirunt*:" but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply that Ulpian was of a different opinion. As to the last conjecture, that only *certain cases* and *circumstances* are meaned by the word *quidam*, it scarce deserves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as Taurelli himself admits, a Greek. Whatever, in short, be the genuine words of this much controverted clause, I am persuaded that it ought by no means to be strained into an inconsistency with the *second* law; and this has been the opinion of most foreign jurists, from Azo and Alciat down to Heineccius and Huber; who, let their dissension be, on other points, ever so great, think alike in distinguishing *three degrees* of neglect, which we may term *gross*, *ordinary*, and *slight*, and in demanding responsibility for those degrees according to the rule before expounded.

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The law, then, on this head, which prevailed in the ancient Roman empire, and still prevails in Germany, Spain, France, Italy, Holland, constituting, as it were, a part of the law of nations, is in substance what follows.

Definitions and rules.

Gross neglect, *lata culpa*, or, as the Roman lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to *dolus*, or *fraud* (6) itself; and

(6) Judge Story remarks, that, in various passages of this essay, it seems to be assumed, that, in the common law, as in the civil law, gross negligence and fraud are equivalent. Thus, he observes, *ordinary* negligence is spoken of as "a mean between fraud and accident" (p. 8); gross negligence, as "inconsistent with good faith" (pp. 10, 46, 119); and a bailee without reward, as being "answerable only for fraud, or for gross negligence, which is considered evidence of it" (p. 46). But this doctrine is not warranted by the common law authorities. One case opposed to it is put by Sir W. Jones himself. If, he says (p. 47, citing Bract. 99, b.) a depositor commits a gross neglect in regard to his own goods, as well as those which are bailed, by which both are lost or damaged, he cannot be said to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person. So, where a cartoon was left in the hands of an auctioneer, without any particular agreement to take care of it, or re-deliver it safe, and without any agreement for a reward, and it appeared that the painting was upon paper pasted on canvas, and that the bailee kept it in a room next to a stable in which there was a wall which had made it damp and peal —it was held gross neglect, and the bailee was made responsible, although there was no imputation of fraud. (Mytton *v.* Cock 2 Str. 1099.) These cases show that gross negligence is not equivalent to fraud, according to the common law authorities. On the contrary, gross negligence is, or at least may be, entirely consistent with good faith and honesty of intention; and, to confound it with fraud, would be most mischievous, for then, unless a jury should believe the party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to recover. Besides, if gross negligence were equivalent to fraud, there would be no defence set up by the bailee, founded either on his own conduct in respect to his own goods, on a special contract not to be liable for gross negligence. But there is no principle in our law that would prevent a depositary from contracting not to be liable to any degree of mere negligence. (Story 13, et seq.) But see Foster *v.* Essex. Bank, 17 Mass. 479. See also Lafarge *v.* Morgan 11. Martin's (Lou.) Rep. 462. In 2 Comm, 562. n. (b.) Chancellor Kent remarks, that although gross negligence is not *equivalent* to fraud, and so far the expression of Sir W. Jones is too forcible, yet that *it is looked upon as*

consists, according to the best interpreters, in the *omission* of that care *which even inattentive and*
[22] *thoughtless men never fail to take of their own property:* this fault they justly hold a violation of *good faith.*

Ordinary neglect, *levis culpa*, is the *want* of that diligence which the *generality of mankind use in their own concerns*, that is, of *ordinary care.*

Slight neglect, *levissima culpa*, is the *omission* of that care which *very attentive and vigilant persons take of their own goods*, or in other words, of *very exact diligence.*

Now, in order to ascertain the degree of neglect for which a man who has in his possession the goods of another is made responsible by his contract, either *express* or *implied*, civilians establish *three* principles, which they deduce from the law of Ulpian on the edict; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus*; (*l*) as many poems and histories in ancient languages are denominated from their *initial* words.

First, in contracts which are beneficial *solely* to the owner of the property holden by another, no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross* neglect; this, therefore, is the general

(*l*) Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Instead of *ff*, which is a barbarous corruption of the initial letter of πανδέκται, many write D., for Digest, with more clearness and propriety.

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evidence of fraud and it would require strong and peculiar circumstances to rebut the presumption. And in the text, p. 560, he adopts the language of Sir W. Jones and Ch. J. Parker.

rule in *depositi;* but in regard to *commissions*, or, as foreigners call them, *mandates*, and the *implied* contract, *negotiorum gestorum*, a certain care is requisite, [23] from the *nature of the thing;* and, as *good faith* itself demands that care be proportioned to the exigence of each particular case, the law *presumes* that the mandatary or commissioner, and by parity of reason, the *negotiorum gestor*, engaged at the time of contracting to use a degree of diligence *adequate to the performance of the work undertaken.*(m)

Secondly, in contracts *reciprocally* beneficial to *both* parties, as in those of *sale*, *hiring*, *pledging*, *partnership*, and the contract implied in *joint property*, such care is exacted *as every prudent man commonly takes of his own goods;* and by consequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are answerable for *ordinary* neglect.

Thirdly, in contracts from which a benefit accrues *only* to him who has the goods in his custody, as in that of *lending for use*, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore, responsible for *slight* negligence.

This had been the learning generally, and almost unanimously received and taught by the doctors of Roman law; and it is very remarkable that even Antoine Favre, or Faber, who was famed for inno- [24] vation and paradox, who published two ample volumes, *De Erroribus Interpretum*, and whom Gravina justly calls the *boldest of expositors and the*

(m) Spondet diligentiam, say the Roman lawyers, gerendo negotio parem—Vide post, p. 63, n.—T.

keenest adversary of the practisers,(n) discovered no error in the common interpretation of two celebrated laws which have so direct and so powerful an influence over social life, and which he must repeatedly have considered; but the younger Godefroi, of Geneva, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular commentary on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the ancient Romans, and endeavoured to support a new system of his own.

System of J. Godefroi.

He adopts, in the first place, the Florentine reading, of which the student, I hope, has formed, by this time, a decided opinion from a preceding page of this essay.

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet admits that the rule which he condemns had the approbation and support of Modestinus, of Paulus, of Africanus, of Gaius, and of the Great Papinian himself; nor does he satisfactorily prove the fallaciousness to which he objects, unless every rule be fallacious to which there are some exceptions. He understands by *diligentia*
[25] that care which *a very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts which immediately precede the disputed clause; in the two which follow it, he requires no more than *ordinary* diligence. He admits, however, the three degrees of neglect above stated, and uses the common epithets, *levis* and *levissima;* but, in order to reconcile his system with many

(n) Orig. Jur. Civ. lib. i. § 183.

laws which evidently oppose it, he ascribes to the old lawyers the wildest mutabiliy of opinion, and is even forced to contend that Ulpian himself *must have changed his mind.*

Since his work was not published, I believe, in his lifetime, there may be reason to suspect that he had not completely settled *his own* mind; and he concludes, indeed, with referring the decision of every case on this head, to that most dangerous and most tremendous power, *the discretion of the judge.* (*o*)

Systems of Zasius and Donellus.

The *triple* division of neglects had also been highly censured by some lawyers of reputation. Zazius had very justly remarked, that neglects differed in *degree*, but not in *species;* adding, "that he had no objection to the use of the words *levis* and *levissima* merely as terms of practice adopted in courts for the more easy distinction between the different degrees of care exacted in the performance of different contracts;"(*p*) but Donellus, in opposition to his master Duaren, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism; (*q*) the minor proposition of which is raised on the figurative and inacurative manner in which positives are often used for superlatives, and conversely, even by the best of the old Roman lawyers. True it is, that, in the law *Contractus*, the division appears to be

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(*o*) "Ergo certe hac in re censentibus accedo, vix quidquam generalius definiri posse; remque hanc ad *arbitrium judicis*, prout res est, referendam." p. 141.

(*p*) Zas. Singul. Resp. lib. i. cap. 2.

(*q*) "Quorum definitiones eædem sunt, ea inter se sunt eadem; *levis* autem culpæ et *levissimæ* una et eadem definitio est: utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

twofold only, *dolus* and *culpa;* which differ in *species,* when the first means *actual fraud and malice,* but in *degree* merely when it denotes no more than *gross neglect;* and in either case, the second branch, being capable of *more* and *less,* may be subdivided into *ordidinary* and *slight;* a subdivision which the law *Si ut certo* obviously requires; and thus are both laws perfectly reconciled.

We may apply the same reasoning, changing what should be changed, to the *triple* division of *diligence;* for, when *good faith* is considered as implying at least the exertion of *slight* attention, the other branch, *care,* is subdivisable into *ordinary* and *extraordinary;*
[27] which brings us back to the number of degrees already established both by the analysis and by authority.

System of Le Brun.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the Parliament of Paris, who may, probably, be now living, and, possibly, in that professional station to which his learning and acuteness justly entitle him. I speak of M. Le Brun, who published, not many years ago, an Essay on Responsibility for Neglect, (*r*) which he had nearly finished before he had seen the commentary of Godefroi, and, in all probability, without ever being acquainted with the opinion of Donellus.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both,* or to *one,* of the contracting parties; yet he charges Godefroi with a want of due

(*r*) Essai sur la Prestation des Fautes, a Paris, chez Saugrain, 1764.

clearness in his ideas, and with a palpable misinterpretation of several laws. He reads *in his quidem et diligentiam;* and that with an air of triumph; insinuating, that quidam was only an artful conjecture of Cujas and Le Conte, for the purpose of establishing *their* system; and he supports his own reading by the authority of Basilica; an authority, which, on another occasion, he depreciates. He derides the absurdity of *permitting negligence* in any contract, and urges, that such *permission*, as he calls it, is against express law: "Now," says he, "where a contract is beneficial to both parties, the doctors *permit* slight negligence, which, how slight soever, is still *negligence*, and ought always to be inhibited." He warmly contends that the Roman laws, properly understood, admit only two degrees of diligence; one, measured by that which *a provident and attentive father of a family* uses in his own concerns; another, by that care which the *individual party* of whom it is required *is accustomed to take of his own possessions:* and he very ingeniously substitutes a new rule in the place of that which he rejects; namely, that, *when the things in question are the* sole *property of the person to whom they must be restored*, the holder of them is obliged to keep them with the *first* degree of diligence; whence he decides, that a *borrower* and a *hirer* are responsible for precisely the same neglect; that a vendor, who retains for a time the custody of the goods sold, is under the same obligation, in respect of care, with a man who undertakes to manage the affairs of another, either *without* his request, as a *negotiorum gestor*, or *with* it, as a *mandatary*. "But," says he, "*when the things are the* joint *property of the parties contracting*,

[28]

no higher diligence can be required than the second degree, or that which the *acting party* commonly uses in *his own* affairs; and it is sufficient *if he keep them*
[29] *as he keeps his own.*" This he conceives to be the distinction between the eight contracts which precede, and the two which follow the words "in his quidem et diligentiam."

Throughout his work he displays no small sagacity and erudition, but speaks with two much confidence of his own decisions, and with too much asperity or contempt of all other interpreters, from Bartolus to Vinnius.

At the time when this author wrote, the learned M. Pothier was composing some of his admirable treatises on all the different species of express or implied contracts; and here I seize, with pleasure, an opportunity of recommending those treatises to the English lawyer, exhorting him to read them again and again; for, if his great master Littleton has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans (*s*): for my own part, I am so

(*s*) Oeuvres de M. Pothier, à Paris, chez Debure: 28 volumes in duodecimo, or 6 in quarto. The illustrious author died in 1772—(7.)

(7) The facility of obtaining separately or collectively the works of Pothier, and their very moderate price, leaves the English lawyer no excuse for not making himself in some degree acquainted with them. The republication of the Treatise on the Law of Obligations, translated by the late Sir W. D. Evans, Recorder of Bombay, is a desideratum for those who are too indolent to resort to it in the author's own language.—T.

charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public than barely the introduction of Pothier to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt which *every man*, according to Lord Coke, *owes to his profession.* [30]

Vindication of the old system by Pothier.

To this venerable professor and judge (for, he had sustained both characters, with deserved applause,) Le Brun sent a copy of his little work; and M. Pothier honoured it with a short but complete answer in the form of a General Observation on his Treatises (*t*); declaring, at the same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the ancient system, which he politely ascribes to *the natural bias of an old man in favour of opinions formerly imbibed.* This is the substance of his answer: "That he can discover no kind of absurdity in the usual division of *neglect* and *diligence*, nor in the *rule* by which different *degrees* of them are applied to different contracts; that, to speak with strict propriety, negligence is not *permitted* in any contract, but *a less rigorous construction* (8) prevails in some than in others; that a *hirer*, for instance,

(*t*) It is printed apart, in fourteen pages, at the end of his Treatise on the Marriage-contract.

(8) Diligence is in some sort a relative term; and it is evident that what would amount to the requisite diligence at one time and under one set of circumstances, may not amount to it at another. (Batson *v.* Donovan, 4 B. & Ald. 21.) He who asks a favour has no right to expect to be absolved from a proportionate care; and he who accepts a burden, has a right to demand that he shall not be required to be as scrupulously exact as if he received a benefit. (Story, 12.)

is not considered as *negligent*, when he takes the same care of the goods hired which the generality of mankind take of their own; that the *letter to hire*,
[31] who has his reward, must be presumed to have demanded at first no higher degree of diligence, and cannot justly complain of that *inattention* which in another case might have been culpable; for, a *lender*, who has *no* reward, may fairly exact from the borrower that *extraordinary* degree of care which *a very attentive person of his age and quality* would certainly have taken; that the diligence which *the individual party commonly uses in his own affairs* cannot properly be the object of judicial inquiry; for, *every* trustee, administrator, partner, or co-proprietor, must be *presumed* by the court, auditors, or commissioners, before whom an account is taken, or a distribution or partition made, to use in *their own* concerns such diligence as in commonly used by *all prudent men*; that it is a violation of *good faith* for any man to take less care of another's property which has been intrusted to him, *than of his own;* that, consequently, the author of the new system demands no more of a *partner* or a *joint-owner* than of a *depositary*, who is bound to keep the goods deposited *as he keeps his own;* which is directly repugnant to the indisputable and undisputed sense of the law *Contractus*."

I cannot learn whether M. Le Brun ever published a reply, but am inclined to believe that his system has gained very little ground in France, and that the
[32] old interpretation continues universally admitted on the continent both by theorists and practisers.

Nothing material can be added to Pothier's argument, which, in my humble opinion, is unanswerable;

but it may not be wholly useless to set down a few general remarks on the controversy: particular observations might be multiplied without end.

Observations on Le Brun.

The only *essential* difference between the systems of Godefroi and Le Brun relates to the two contracts which follow the much-disputed clause; for, the Swiss lawyer makes the partner and co-proprietor answerable for *ordinary* neglect, and the French advocate demands no more from them than *common honesty:* now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously that the other part of it fails in the article of Marriage-portions.(*u*)

In regard to the division of neglect and care into *three* degrees or *two*, the dispute appears to be merely verbal; yet, even on this head, Le Brun seems to be self-confuted: he begins with engaging to prove "that only *two* degrees of fault are distinguished by the laws of Rome," and ends with drawing a conclusion that they acknowledge but *one* degree; now, though this might be only a slip, yet the whole tenor of his book establishes *two* modes of *diligence*, the omissions of [33] which are as many neglects, exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that which he repudiates. It is true that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross;* which would have demonstrated the weakness of his whole system.(*v*)

This disquisition amounts, in fact, to this; from the barrenness or *poverty*, as Lucretius calls it, of the

(*u*) See p. 71, note; and p. 126. (*v*) See pages 32, 73, 74, 149.

Latin language, the single word *culpa* includes, as a generic term, various degrees or shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the Greek, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words ῥᾳθυμία and ἀμέλεια, which are by no means synonymous, the former implying a certain *easiness of mind* or *remissness of attention*, while the second imports a higher or more
[34] culpable degree of *negligence*.(*w*.) This observation, indeed, seems to favour the system of Godefroi; but I lay no great stress on the mere words of the translation, as I cannot persuade myself that the Greek jurists under Basilius and Leo were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that which Pothier has recommended and illustrated.

English law. I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically, from the oldest Year-book or Treatise, to the latest adjudged case; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species* of bailment, observing, at the same time, under each head, a kind of historical order. It must have occurred to the reader,

(*w*) Basilica, 2, 3, 23. See Demosth. 3 Phil. Reiske's edit. I. 112, 3. For *levissima culpa*, which occurs but once in the whole body of Roman law, ῥᾳθυμία seems the proper word in Greek; and it is actually so used in the Basilica, 60, 3, 5, where mention is made of the Aquilian law, *in qua*, says Ulpian, *et levissima culpa venit*. D. 9. 2. 44.

that I might easily have taken a wider field, and have extended my inquiry to every possible case in which a man *possesses for a time the goods of another:* but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished; it will be sufficient to remark that the rules are in [35] general the same, by whatever means the goods *are legally* in the hands of the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding (*x*,) or in consequence of some distinct contract.

Lord Holt's division of bailments.

Sir John Holt, whom every Englishman should mention with respect, and from whom no English lawyer should venture to dissent without extreme diffidence, has taken a comprehensive view of this whole subject in his judgment on a celebrated case(9) which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine which he propounds in the course of his argument.(*y*.)

His division of bailments into six sorts appears, in the first place, a little inaccurate; for, in truth, his

(*x*) Doct. & Stud. dial. 2. ch. 38; Lord Raym. 909. 917. See Ow. 141; 1 Leon. 224; 1 Cro. 219. Mulgrave & Ogden.—*Post*, p. 52, n. (21.)—T.

(*y*) Lord Raym. 912.

(9) Coggs *v.* Bernard, 2 Lord Raym. 909. See post. p. 58, and the case in full in the Appendix.

fifth sort is no more than a branch of his third, and he might, with equal reason, have added a seventh, since the fifth is capable of another subdivision. I acknowledge, therefore, but five(10) species of bailment, which I shall now enumerate and define, with
[36] all the Latin names, one or two of which Lord Holt has omitted. 1. *Depositum*, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. *Mandatum*, or *commission*, when the mandatary undertakes, without recompense, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir Henry Finch divides bailment into *two* sorts, to *keep* and to *employ*.(z.) 3. *Commodatum*, or *loan for use*, when goods are bailed, without pay, to be *used* for a certain time by the bailee. 4. *Pignori acceptum*, when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. *Locatum*, or *hiring*, which is always for *a reward;* and this bailment is either, 1. *Locatio rei*, by which the hirer gains the temporary use of *the thing*, or, 2. *Locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or bestowed on the thing delivered, or, 3. *Locatio operis mercium vehendarum*(11,) when goods are bailed for the purpose of

New division and definitions.

(z) Law, b. 2, ch. 18.

(10) (2 Kent, 559.) Reducible into three classes. 1. Those in which the trust is for the benefit of the bailor. 2. Those in which the trust is for the benefit of the bailee; and 3. Those in which the trust is for the benefit of both parties. The first embraces deposits and mandates; the second, gratuitous loans for use; and the third, pledges or pawns, and hiring and letting to hire. (Story, 3.)

(11) Following the civil law, Judge Story divides hiring into *four* sorts. 1. The hiring of a thing for use (locatio rei.) 2. The hiring of work and labour

being *carried* from place to place, either to a *public* carrier, or to a *private* person.

Law of deposits.

I. The most ancient case that I can find in our books on the doctrine of deposits (there were others, indeed, a few years earlier, which turned on points of pleading) was adjudged in the eighth of Edward II., and is abridged by Fitzherbert.(*a*) It may be called *Bonion's* case, from the name of the plaintiff, and was, in substance, this:—An action of detinue was brought for *seals*, *plate*, and *jewels*, and the defendant pleaded, "that the plaintiff had bailed to him a chest *to be kept*, which chest was *locked;* that the bailor himself took away the key, *without informing the bailee of the contents;* that robbers came in the *night*, *broke open the defendant's chamber*, and carried off the chest into the fields, where they forced the lock, and took out the *contents:* that the defendant was robbed at the same time of his own goods." The plaintiff replied, "that the jewels were delivered, in a chest *not locked*, to be restored at the pleasure of the bailor;" and *on this*(12), it is said, *issue was joined.*

[37] Bonion's case.

(*a*) Mayn. Edw. II, 275. Fitz. Abr. tit. Detinue, 59.

(locatio operis faciendi.) 3. The hiring of care and services to be performed or bestowed on the thing delivered (locatio custodiæ.) 4. The hiring of the carriage of goods (locatio operis mercium vehendarum) from one place to another. The three last are but subdivisions of the general head of hire of labour and services (locatio operis.) Under the third division (locatio custodiæ,) omitted by Sir W. Jones as a useless subdivision, (Jones, 97,) come the case of agisters of cattle, warehousemen, and wharfingers, to whom may be added a class of bailees known in this country as forwarding merchants. (Platt *v.* Hibbard, 7 Cowen, 497. Róberts *v.* Turner, 12 Johns. 232.)

(12) This was the issue, according to the Year-Book. According to Fitzherbert, the issue was "whether the goods were taken away by robbers." The former is clearly an immaterial issue, but not the latter; for, the bailee, being

Upon this case Lord Holt observes, "that he cannot see why the bailee should not be charged with goods *in* a chest, as well as with goods *out of* a chest; for, says he, the bailee has as little power over them, as to any benefit that he might have from them, and as great power to defend them, in one case as in the other."(*b*.) The very learned judge was dissatisfied, we see, with Sir Edward Coke's reason, "that, when the jewels were locked up in a chest, the bailee was not, in fact, trusted with them,"(*c*) Now, there was
[38] a diversity of opinion upon this very point(13) among

(*b*) Lord Raym. 914. (*c*) 4 Rep. 84.

a mere depositary, was excused if the loss happened, as appeared from the plea to have been the case, from *contrivance* (it happened in the *night*) and *violence* (the thieves *broke* open the defendant's chamber.) Burglary, in the opinion of Sir William Jones, excuses the depositary; and this opinion seems warranted also by the judgment of the court in Kettle *v.* Bromsale, Willes, 121, and the expressions in Coggs *v.* Bernard, 2 Lord Raym. 915. (Vid. also, Story, 19, 53.)

(13) This question would, in our law, admit of different determinations, according to circumstances. If the bailee knew that the box or casket contained jewels, although the bailor took away the key, he would be bound to a degree of diligence proportioned to the contents. In other words, the same degree of care which would ordinarily be required to be taken of such valuables when deposited, would be exacted of him. If he had no ground to suppose that the box or casket contained any valuables whatsoever, he would be bound only to such reasonable care as would be required of depositaries in cases of articles of common value. And, under such circumstances, if he were guilty of gross negligence, he would be responsible for the loss, at least to the extent of what he might fairly presume to be the value of the contents. If on the other hand, there was a meditated concealment of the contents of the box or casket from the bailee, with a view to induce him to receive the bailment, and he would not have received it, or have exposed it as he did, if he had been made acquainted with the facts, then the transaction would be deemed a fraud upon him; or, at least, the loss would be deemed one occasioned by the bailor's own folly or laches; and the bailee would not, even in a case of gross negligence, be responsible beyond the value of the box or casket itself, without the contents. The two first of these propositions may be deduced from the comments of Lord Holt in the case of Coggs *v.* Bernard. The last seems established by the prevailing doctrine of the common law in respect of carriers. (Story, 54.) See Appendix, CARRIERS.

the greatest lawyers of Rome; for, "it was a question, whether, if a box sealed up had been deposited, the box only should be demanded in an action, or the clothes which it contained should also be specified; and Trebatius insists that the box only, not the particular contents of it, must be sued for, unless the things were previously shown, and then deposited: but Labeo asserts that he who deposits the box deposits the contents of it; and ought, therefore, to demand the clothes themselves. What, then, if the depositary *was ignorant of the contents?* It seems to make no great difference, since he took the charge upon himself; and I am of opinion, says Ulpian, that, although the box was sealed up, yet an action may be brought for what it contained."(*d*) This relates chiefly to the form of the libel; but surely cases may be put in which the difference may be very material as to the *defence.* Diamonds, gold, and precious trinkets, ought, *from their nature,* to be kept with peculiar care under lock and key; it would, therefore, be *gross* negligence in a depositary to leave such a deposit in an open antechamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the nature of things without knowing them; perhaps, therefore, it would be no more than *slight* neglect to leave out of a drawer a [39] box or casket which was neither known nor could justly be suspected to contain diamonds; and Domat, who prefers the opinion of Trebatius, decides, "that, in such a case, the depositary would only be obliged

(*d*) D. 16. 3. 1. 41.

to restore the casket, as it was delivered, without being responsible for the contents of it." I confess, however, that, anxiously as I wish on all occasions to see authorities respected and judgments holden sacred, *Bonion's* case appears to me wholly incomprehensible; for, the defendant, instead of having been *grossly* negligent, (which alone could have exposed him to an action,) seems to have used at least *ordinary* diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible without a *very* special undertaking.(14)

(14) To what extent a special agreement varies the obligations of the bailee, is a question involved in great uncertainty. The general rule would seem to be, not to expound the contract unfavourably to the bailee beyond the obvious scope of its terms. Sir W. Jones thinks that a depositary would not be liable for a loss of goods by *robbery*, without a most express agreement. (Jones, 45.) St. German also holds, that, if a depositary promise to restore the goods *safe*, at his peril, he is not responsible for casualties; but it would be otherwise if he is to receive a reward. (Doct. & Stud. Dial. 2, ch. 38.) Such a bailee, according to Chancellor Kent, would not in consequence of such an agreement be responsible for a loss by *violence*. 2 Comm. 562. Lord Holt, in Coggs *v.* Bernard, (2 Ld. Raym. 909, 915, 918,) was of opinion, that, upon a promise by a bailee without reward to keep or carry *safely*, he is not responsible for injuries or losses occasioned by the acts of *wrong-doers;* and, *a fortiori*, that he is not responsible for a theft not caused by his own neglect. Robbery would, of course, in his opinion, exempt him from liability. Lord Chief Justice Willes, however, seems to have thought, that, upon such a special undertaking, even robbery would not be an excuse. (Kettle *v.* Bromsale, Willes, 121.) The civil law, and the opinion of Sir W. Jones, would make the bailee liable upon such a contract in case of theft, but not of robbery.

In respect to losses occasioned by inevitable accident, as, by lightning, tempests, inundations, &c., there are very respectable authorities, that, notwithstanding a special contract or undertaking to keep *safely*, the bailee will not be responsible for losses. Sir W. Jones manifestly supports this doctrine. It is sanctioned also by St. German in the passage above cited; and was avowed by the Court in Coggs *v.* Bernard. Vid. also Hob. Rep. 34; Doct. & Stud. 130, 222; 1 Bac. Abr. 377. In Aleyne's Reports, 27, this distinction is taken:—"Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident

The plea, therefore, in this case, was good, and the replication idle; nor could I ever help suspecting a mistake in the last words, *alii quod non;* although Richard de Winchedon, or whoever was the compiler of the table to this Year-Book, makes a distinction, that, "if jewels be bailed to me, and *I put them* into a casket, and *thieves rob me of them in the night-time*, I am answerable; not if they be *delivered* to me in a chest *sealed up:*" which could never have been law; for, the next oldest case, in the book of Assise, contains the opinion of Chief Justice Thorpe, that "a general bailee *to keep* is not responsible, *if the goods be stolen*, without his *gross neglect:*"(*e*) and it appears, indeed, from Fitzherbert, that the party was driven [40] to this issue, "whether the goods were taken away by *robbers*."

By the Mosaic institutions, "if a man delivered to his neighbour *money* or *stuff to keep*, and it was *stolen* out of his house, and the thief could not be found, the master of the house was to be brought before the judge, and to be discharged, if he could swear that he had not *put his hand* unto his neighbour's goods,"(*f*) or, as the Roman author of the Lex Dei translates it, *nihil se nequiter gessisse:*(*g*) but a distinction seems to have been made between a stealing by *day* and a Mosaic laws.

(*e*) 29 Ass. 28. Bro. Abr. tit. Bailment, pl. 7. (*f*) Exod. xxii. 7, 8.
(*g*) Lib. 10. De Deposito. This book is printed in the same volume with the Theodosian Code. Paris, 1586.

by inevitable necessity; because, he might have provided against it by his contract." This distinction has the countenance of highly respectable authorities. (Brecknock Canal Co. *v.* Pritchard, 6 T. R. 750. Hadley *v.* Clarke, 8 T. R. 259, 267.) But, in the present state of the law, it does not seem possible to lay down any general rule on the subject, as to what casualties will excuse in cases of a special contract. (Story, 23.)

stealing by *night;*(*h*) and "if *cattle* were bailed and stolen, (by *day*, I presume,) the person who had the care of them was bound to make restitution to the owner;"(*i*) for which the reason seems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depositary, and is, consequently, obliged to use a degree of diligence *adequate to the charge:*(15) now, sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and
[41] we find that, when Jacob, who was, for a long time at least, a bailee of a different sort, *as he had a reward*, lost any of the beasts intrusted to his care, Laban made him answer for them "whether stolen by day or stolen by night."(*k*)

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir Edward Coke in his reports, and afterwards deliberately inserted in his Commentary on Littleton, the great result of all his experience and learning; namely, "that a depositary is responsible, if the goods be stolen from him, unless he accept them specially *to keep as his own;*" whence he advises all depositaries to make such a special acceptance.(*l*) This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the Year-Books, mere conversations on the bench, or loose arguments at the bar; and partly on *Southcote's* case, which he has

(*h*) Gen. xxxi. 39. (*i*) Exod. xxii. 12. (*k*) Gen. xxxi. 39.
(*l*) 4 Rep. 83 b. 1 Inst. 89 a, b.

(15) For a correction of this opinion as to the degree of diligence required of the mandatary, see post, n. 23.

reported, and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained, I shall offer a few remarks on the pleadings in the cause, and the judgment given on them.

Southcote's case.

Southcote declared in detinue, that he had delivered goods to Bennet, *to be by him safely kept:* the defendant confessed *such* delivery, but pleaded in bar, that a certain person *stole* them out of his possession; [42] the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a *servant* of the defendant, and demanded judgment; which, on a general demurrer to the replication, he obtained. "The reason of the judgment," says Lord Coke, "was, because the plaintiff had delivered the goods to be *safely* kept, and the defendant had taken the charge of them upon himself, by accepting them on *such* a delivery." Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit which has occasioned so many reflections on the case itself; namely, "that to keep and *to keep safely* are one and the same thing;" a notion which was denied to be law by the whole court in the time of Chief Justice Holt.(*m*)(16)

(*m*) Ld. Raym. 911, margin.

(16) That an undertaking to keep and to keep safely are one and the same thing, whether the opinion belong to Lord Coke individually, or was delivered by the Court in Southcote's case, all subsequent adjudications have combined to deny. In Coggs *v.* Bernard, the responsibility of the bailee was enlarged in virtue of his special undertaking. In Kettle *v.* Bromsale, Willes, 121, upon a bailment of goods to be *kept safely*, it was held that the defendant was liable though the

It is far from my intent to speak in derogation of the great commentator on Littleton; since it may truly be asserted of him, as Quintilian said of Cicero, that *an admiration of his works is a sure mark of some proficiency in the study of the law;* but it must be allowed that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

[43] The pleader who drew the replication in *Southcote's* case, must have entertained an idea that the *blame* was *greater*, if a *servant* of the depositary stole the goods, than if a mere *stranger* had purloined them: since, the defendant ought to have been more on his guard against a person who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man of whose honesty he was not morally certain: the court, we find, rejected this distinction; and also held the replication informal, but agreed that no advantage could be taken on a *general* demurrer of such informality, and gave judgment on the substantial badness of the plea.(*n*) If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, "that, although a *general* bailee *to keep* be responsible for *gross* neglect *only*, yet Bennet had, by a *special* acceptance, made himself answerable for *ordinary* neglect at least; that it was *ordinary* neglect to let the

(*n*) 1 Cro. 815.

goods were taken from him feloniously. The decision turned upon the special terms of the undertaking; and the court said, that, had the goods been accepted merely to be taken care of as the defendant's own goods, he would not have been liable.

goods be *stolen*(17) out of his possession, and he had not averred that they were stolen *without his default;* that he ought to have put them into a *safe* place, according to his undertaking, and have kept the key of it himself; that the *special* bailee was reduced to the class of a *conductor operis*, or a workman *for hire;* and that a tailor, to whom his employer has delivered [44] lace for a suit of clothes, is bound, if the lace be *stolen*, to restore the value of it."(*o*) This reasoning

(*o*) "Alia est *furti* ratio; id enim *non casui*, sed *levi culpæ*, ferme ascribitur." Gothofr. Comm. in L. *Contractus*, p. 145. See D. 17. 2. 52. 3. where, says the annotator, "Adversus *latrones* parum prodest custodia; adversus *furem* prodesse potest, si quis adviliget." See also Poth. Contrat de Louage, n. 429. and Contrat de Pret a Usage, n. 53. So, by Justice Cottesmore, "Si jeo grante byens a un home a garder a mon oeps, si les byens per *son mesgarde* sont *emblés*, il sera charge a moy de mesmes les byens, mez s'il soit *robbe* de mesmes les byens, il est excusable per le ley." 10 Hen. VI. 21.

(17) "Our law considers theft, like any other loss, to depend for its validity as a defence upon the particular circumstances of the case, and to be governed by the general nature of the bailment, and the responsibility attached thereto. It neither imputes the theft to the neglect of the party, nor, on the other hand, exempts him from responsibility from that fact alone. But it decides upon all the circumstances, as leading to the conclusion that there has or has not been a due degree of care used." (Finucane *v.* Small, 1 Esp. N. P. C. 315. Vere *v.* Smith, 1 Vent. 121. S. C. 2 Lev. 3.) Story, 27.

Although Judge Story has taken considerable pains to prove that the common law does not justify the position that a loss by private theft is presumptive evidence of ordinary neglect, yet, it may be observed, that the above remark, which is a summary of his argument, expresses sir W. Jones's opinion, with which also the whole argument so well agrees that it is difficult to discover any difference between them. The difference, if any, is at most merely formal. Sir W. Jones no where represents theft so presumptive of neglect as to exclude evidence to rebut the presumption. He evidently considers it as a mere presumptio juris, not presumptio juris et de jure: and, what more is that than saying that theft shall not avail a bailee as a defence without some explanation of the circumstances under which it happened? Nor, seemingly, would the learned Judge allow it to be a defence, if it happened through the default of the bailee, or through his own negligence. The difference, therefore, seems to turn merely on this, that Sir W. Jones would disallow the plea, unless, in addition to the

would not have been just, if the bailee had pleaded, as in *Bonion's* case, that he had been *robbed by violence*, for, no degree of *care* can, in general, prevent an open robbery: *impetus prædonum*, says Ulpian, *a nullo præstantur.*

Mr. Justice Powell, speaking of *Southcote's* case, which he denies to be law, admits, that "if a man *does* undertake *specially* to keep goods *safely*, that is a warranty, and will oblige the bailee to keep them safely against perils where *he has a remedy over*, but *not* against those where he has *no* remedy over."(*p*) One is unwilling to suppose that this learned judge had not read Lord Coke's report with attention; yet the case which he puts is precisely that which he opposes; for, Bennet *did* undertake "to keep the goods *safely:*" and, with submission, *the degree of*
[45] *care demanded*, not *the remedy over*, is the true measure of the obligation; for, the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods against *robbers* without a most express agreement.(*q*) This, I apprehend, is all that was meaned by St. German, when he says, "that, if a man *have nothing* for keeping the goods bailed, and promise, at the time of the delivery, to restore them *safe at his peril*, he is not responsible for *mere casualties;*"(*r*) but the rule extracted from this passage, that a *special* acceptance *to keep safely* will not charge the bailee

(*p*) Ld. Raym. 912.
(*q*) 2 Sho. pl. 166.
(*r*) Doct. & Stud. Dial. 2. chap. 38.

allegation of the theft, it negatived the suspicion of default or negligence. I venture to think this the better opinion, according to the principles of special pleading.—T. (Vid. Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275.)

against the acts of *wrong-doers*,"(*s*) to which purport *Hobart* also and *Croke* are cited, is too general, and must be confined to acts of *violence*.

I cannot leave this point without remarking, that a *tenant at will*, whose interest, when he has it rent-free, the Romans called *precarium*, stands in a situation exactly parallel to that of a depositary; for, although the contract be for *his benefit*, and, in some instances, for his benefit *only*, yet he has an *interest* in the land till the will is determined, "and, our law adds, it is the folly of the lessor if he do not restrain him by a special condition:" thence it was adjudged, in the *Countess of Shrewsbury's* case, "that an action will [46] not lie against a tenant at will *generally*, if the house be burned through his neglect;(*t*) but, says Justice Powell, "had the action been founded on a *special* undertaking, as that, in consideration that the lessor would let him live in the house, he would deliver it up *in as good repair as it then was in*, such an action would have been maintainable."(*u*)

Rules and exceptions.

It being then established that a bailee of the *first* sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself *a careless and inattentive* man; a question may arise, whether, if proof be given that he is in truth very *thoughtful and vigilant in his own concerns*, he is not bound to restitution, if the deposit be lost through his neglect, either *ordinary* or *slight;* and it seems easy to support the affirmative; since, in this case, the measure

(*s*) Com. 135. Ld. Raym. 915.
(*t*) 5 Rep. 13 b.
(*u*) Ld. Raym. 911.

of diligence is *that which the bailee uses in his own affairs.*(18) It must, however, be confessed, that the

(18) It is often laid down in our books, and Sir W. Jones seems here to recognize the doctrine, that the depositary is bound to take the same care of the deposited goods as he takes of his own: and it is thence deduced, as a corollary, that, if he commits a gross neglect in regard to his own goods as well as in regard to those bailed, by which both are lost, he is not liable, and the depositor must impute it to his own folly to have trusted so improvident a person. Sir W. Jones in his commentary on the case of Mytton v. Cock, (Jones, 122, 123,) so states the doctrine. Bracton, Lib. 3, 99 b, lays down the same rule. In this he does no more than copy the very words of the Institutes, (Just. Inst. Lib. 3, tit. 15, s. 3; and he is supported by the clear result of the Pandects (Dig. Lib. 16, tit. 3, l. 32); Domat. Lib. 1, tit. 7, s. 3, n. 2.) Lord Holt, too, has given the doctrine the authority of his own great name (Coggs v. Bernard, 2 Ld. Raym. 909.) Pothier implicitly adopts it, (Pothier Traité de Dépôt, ch. 2, s. 1, art. 1, n. 27;) and in America he is followed by Mr. Chancellor Kent, and other learned judges. (2 Comm. 562. Foster v. Essex Bank, 17 Mass. R. 479.) See also Gibbon v. Paynton, 4 Burr. 2298.

Notwithstanding the weight of these authorities, they seem not to express the general rule in its true meaning. The depositary is, as has been seen, bound to slight diligence only; and the measure of that diligence is that degree which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. (Tompkins v. Saltmarsh, 14 Serg. & R. 275.) The measure, abstractedly considered, has no reference to the character of the individual, but looks to that which belongs to the whole class of persons; and so Sir William Jones has intimated upon some occasions.

Cases may, indeed, occur in which the character of the individual may be important, for the purpose, not of furnishing a general rule, but an exception to that rule. As if the depositor should knowingly trust his diamonds or other valuables with a man notoriously weak and infirm in judgment, or to a minor without any experience or discretion, or to a man subject to an absence of mind bordering on derangement, or to a person given to habitual intoxication; and from these known infirmities the thing bailed should innocently be lost; there might be strong ground to presume that the depositor was content to trust the party, with all his faults and infirmities, and to take upon himself the responsibility of all losses not arising from actual fraud. At least, it might fairly be left to the jury to presume a special contract in such a case, that the depositary should take the same care as he did of his own property, and that he should not be responsible except for fraud. (The William, 6 Rob. 316.) But these cases do not impugn the general rule. They turn upon circumstances which imply a waiver of it, or a substitution of a different contract.

The doctrine here stated has also the sanction of adjudged cases in its support. Thus, where a gratuitous bailee put a horse of his brother into a pasture with his own cattle in the night time, and, by reason of a defect of fences, the

character of the individual depositary can hardly be an object of judicial discussion: if he be *slightly* or

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horse fell into a neighbouring field and was killed; it was thought that he was responsible to the owner, because it was gross negligence to put the horse into a dangerous pasture to which he was unused. Rooth *v.* Wilson, 1 B. & Ald. 59.) The true way of determining questions of this character is, to consider whether the party has omitted that care which bailees without reward are usually understood to take of property of the like nature. Therefore, where a person had a deposit of money, and put it with his own in a valise on board a steamboat, and left it there in an exposed situation all night, and it was stolen, and his own money was left, he was held responsible for gross negligence. But, if he had left it for a moment only, under ordinary circumstances, and no danger pressing, it would have been otherwise. (Tracy *v.* Wood, 3 Mason R. 132.) Lord Stowell, in a case of justifiable capture, where the captors are held responsible for due (that is for reasonable) diligence, has expressed himself with great clearness on this subject. "On questions of this nature," says he, "there is one position sometimes advanced which does not meet with my entire assent, namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such a case; for, a man may, with respect to his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might indeed be considered as a reasonable criterion." (The William, 6 Rob. 316.) Certainly it might, if such character was known, and the party, under the circumstances, might be presumed to rely, not on the rule of law, but on the care which the party was accustomed to take of his own property, in makng the deposit. But, unless he knew the habits of the bailee, or could fairly be presumed to trust to such care as the bailee might use about his own property of a like nature, there is no ground to say that he has waived his right to demand reasonable diligence. (Story, 42.)

The civil law did not exact of the depositary any greater diligence than that which he was wont to bestow on his own property under the like circumstances; and it has been followed in this respect by Bracton, Holt, and Sir W. Jones. It was considered that there was no just ground to infer bad faith in such a case. If the depositor knew the general character, employment, and situation of the depositary, or was presumed to know them, the rule of the civil law is a sound and a just rule. But if not, then it has been held that the depositary is bound to bestow ordinary care on the deposit, though he does not on his own goods, and that such care is to be ascertained *without reference to the character of the depositary.* (The William, 6 Rob. 316. Story's Comm. 43–48.) This last position has been ably and learnedly reasoned, but, in my judgment,

even *ordinarily* negligent in keeping the goods deposited, the favourable presumption is that he is equally neglectful of his own property; but this pre-
[47] sumption, like all others, may be repelled; and, if it be proved, for instance, that, his house being on fire, he saved his own goods, and, having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner.(*w*) If, indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as, fine linen or silks; in which case he ought to save the more valuable chest, and has a right to claim indemnification from the depositor for the loss of his own. Still further, if he commit even a *gross* neglect in regard to his own goods *as well as* those bailed, by which *both* are lost or damaged, *he cannot be said to have violated good faith*, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person.(*x*)

To this principle, that a depositary is answerable *only* for *gross* negligence, there are some exceptions.

First, as in *Southcote's* case, where the bailee, by a *special* agreement, has engaged to answer for less:

(*w*) Poth. Contrat de Depot, n. 29. Stiernh. de Jure Sueon. l. 2, c. 5.
(*x*) Bract. 99 b. Justin. Inst. l. 3, tit. 15.

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without success; for in such cases great stress is and ought to be laid upon the habits, employment, and character of the depositary; and the adjudged cases do not appear to warrant any other conclusion. 2 Kent, 562, n. (a.) See also Gibbon v. Paynton, 4 Burr. 2300. Stanton v. Bell, 2 Hawks, (N. C.) Rep. 145. Shiells v. Blackburne, 1 H. Bl. 158. Nelson v. M'Intosh, 1 Stark. 238.

"Si quid nominatim convenit," says the Roman lawyer, "vel plus vel minus in singulis contractibus, hoc [48] servabitur quod initio convenit; legem enim contractui dedit;"(y) but the opinion of Celsus, that an agreement *to dispense with deceit* is void, as being contrary to good morals and decency, has the assent both of Ulpian and our English courts.(z)

Secondly, when a man spontaneously and officiously proposes to keep the goods of another, *he may prevent the owner from intrusting them with a person of more approved vigilance;* for which reason *he takes upon himself*, according to Julian, *the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties.*(a)(19)

Where things are deposited through necessity on any sudden emergence, as a fire, or a shipwreck, M. Le Brun insists, "that the depositary must answer for *less than gross* neglect, how careless soever he may be in his own affairs; since the preceding remark that *a man who reposes confidence in an improvident*

(y) L. Contractus, 23. D. de reg. jur. (a) D. 16. 3. 1. 35.
(z) Doct. & Stud. dial. 2, ch. 38.

(19) The incorporation of this rule into our law ought not readily to be admitted. It has been transferred from the civil law, by Sir W. Jones, without authority, and seems to be punishing a friend rather than a stranger for an act of disinterested kindness. Sir W. Jones has himself quoted, with apparent approbation, the opinion of Labeo in the stronger case of a *negotiorum gestor*, (one who, in the civil law, spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs,) in which Labeo requires no more than good faith of him when he interferes officiously, but from pure kindness, to act in my affairs; affectione coactus, ne bona mea distrahantur, negotiis se meis obtulerit. The good sense of this as a general rule, interpreting the offer of the party in its fair intendment, would seem more to belong to the manliness of the common law, than the rule promulgated by Julian, even with all the authority of imperial wisdom. (Story, 58. 2 Kent, 565.)

person must impute any loss to his own folly, is inapplicable to a case where the deposit was not optional; and the *law ceases with the reason of it;*"(*b*) but that is not the *only* reason; and, though it is an additional misfortune for a man in extreme haste and deep dis-
[49] tress to light upon a stupid or inattentive depositary, yet I can hardly persuade myself that more than perfect *good faith* is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at Rome by a forfeiture of the double value of the goods deposited.

In these circumstances, however, a benevolent *offer* of keeping another's property for a time, would not, I think, bring the case within Julian's rule before mentioned, so as to make the person offering answerable for *slight*, or even *ordinary* negligence; and my opinion is confirmed by the authority of Labeo, who requires no more than *good faith* of a *negotiorum gestor*, when "affectione coactus, ne bona mea distrahantur, negotiis se meis obtulerit."

Thirdly, when the bailee, improperly called a *depositary*, either *directly* demands and receives a reward *for his care*, or takes the charge of goods *in consequence of* some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and *lets out* his mental labour at a just price; thus, when clothes are left with a man who is paid for the use of his bath; or a trunk with an innkeeper or his servants, or with a ferryman; the bailees are as much bound to indem-

(*b*) De la Prestation des Fautes, p. 77.

nify the owners, if the goods be lost or damaged through their want of *ordinary* circumspection, as if they were to receive a stipulated recompense *for their* [50] *attention and pains:* but of this more fully, when we come to the article of *hiring.*

Fourthly, when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for *slight* negligence; and this bailment, indeed, is rather a *loan* than a deposit, in whatever light it may be considered by the parties. Suppose, for example, that Charles, intending to appear at a masked ball expected to be given on a future night, requests George to lend him a dress and jewels for that purpose, and that George, being obliged to go immediately into the country, desires Charles to keep the dress till his return, and, if the ball be given in the mean time, to wear it; this seems to be a regular *loan*, although the original purpose of borrowing be future and contingent.(20)

(20) In general, it may be laid down that a depositary has no right to use the thing deposited. (Bac. Abr. Bailm. D.) But there are cases in which the use of the thing may be necessary for the due preservation of the deposit; and there are other cases in which the use would be, if not beneficial, at least indifferent. There are cases also, in which it would be mischievous. As, therefore, every case must be governed by its own particular circumstances, it has been suggested, that the best general rule on the subject is, to consider whether there may or may not be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to its injury, or if perilous, it ought not to be presumed; if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable. Without either the express or presumed permission of the depositor, the depositary cannot make use of the thing deposited. (Story, 68, 70.)

Since, therefore, the two last cases are not in strict propriety *deposits*, the exceptions to the general rule are reduced to two only; and the second of them, I conceive, will not be rejected by the English lawyer, although I recollect no decision or dictum exactly conformable to the opinion of Julian.

Clearly as the obligation to *restore* a deposit flows from the nature and definition of this contract, yet,
[51] in the reign of Elizabeth, when it had been adjudged, consistently with common sense and common honesty, "that an action on the case lay against a man who had not performed his promise of re-delivering, or delivering over, things bailed to him," that judgment was *reversed;* and, in the sixth year of James, judgment for the plaintiff was arrested in a case exactly similar; (*c*) it is no wonder that the profession *grumbled*, as Lord Holt says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established.(*d*)

Grecian and Arabian laws.

Among the curious remains of Attic law which philologers have collected, very little relates to the contracts which are the subject of this essay; but I remember to have read of Demosthenes, that he was advocate for a person with whom *three* men had deposited some valuable utensil of which they were joint-owners; and the depositary had delivered it to *one* of them, of whose knavery he had no suspicion; upon which the other *two* brought an action, but were nonsuited on their own evidence that there was a *third* bailor whom they had not joined in the suit;

(*c*) Yelv. 4, 50, 128.

(*d*) 2 Cro. 667. Wheatley *v.* Low. [As to the interest of the bailee in the deposit, see the learned disquisition of Mr. Justice Story, Comm. 71. 108.]

for, the truth not being proved, Demosthenes insisted, *that his client could not legally restore the deposit, unless all three proprietors were ready to receive it;* and this doctrine was good at Rome as well as at Athens, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster-hall.(*e*)(21)

(*e*) D. 16. 3. 1. 36.

(21) Property belonging to several joint owners, who concurrently deposit it with a bailee by whom it is accepted on their joint account, cannot be legally demanded without the consent of all parties. If, however, the bailee is not privy to such arrangement, but accepts the property from one of them, by whom as well as by the bailee, it is treated as belonging to him exclusively, the bailee cannot set up the want of consent of the other party, not privy to the deposit, to prevent his re-delivery of the property to him who bailed it, or to his legal representatives. May *v.* Harvey, 13 East, 197.

If the depositary detain the goods after demand by the bailor, or otherwise convert them to his own use, the bailor may maintain trover, detinue, or assumpsit. He may maintain trover, on the ground of the conversion; detinue, because the goods are unlawfully detained; and assumpsit, on the contract. In some cases, also, a special action on the case, and in others, an action of trespass, will lie. Thus if A borrows a horse to go to Dover, and goes to other places, the owner may have an action on the case against him for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but a general action of trespass would not lie in this case, but it is not an open and violent invasion of it. Roll. Rep. 128. Bac. Abr. 374. But if a man lend to another sheep to stock his land, and the bailee kill them, the owner shall have a general action of trespass, or an action of trover, at his election; for though the use is in the borrower, yet the property is in the lender, and the killing of the sheep is in open violation of another's property, which is complained of in the general action of trespass. Co. Lit. 57. Cro. Eliz. 784. Moore, 244. Owen, 52. Dyer, 121. pl. 17.1 Bac. Abr. 374. No action will lie against a mere naked bailee, to recover goods in his possession, until after a demand and refusal. Brown and Hotchkiss *v.* Cook, 9 Johns. Rep. 361. If goods are bailed by B. to C., C. must deliver them to B., for C. cannot pretend to remove or alter that possession committed to him in order to restore it to the right owner, for the right of restitution must be demanded of him that did the injury, of which C. has no pretence to judge, and therefore it would be downright treachery in him to deliver them to any other than him from whom he had them. Roll. Abr. 607. 1 Bac. Ab. 369. But if A. bails goods to B. to which C. has a right, and B. dies, his executors are chargeable only to C. that has right, for the executors came

The obligation to return a deposit faithfully, was, in very early times, holden sacred by the Greeks, as

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to the possession by the law, and therefore must deliver it to those persons in whom the law has established the property; and the taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, so far as there are assets, but doth not embark the executor in the personal trusts of the deceased, any more than he is obliged to answer for his several injuries. Roll. Ab. 607. 1 Bac. Ab. 369. This doctrine, however, according to the opinion of Judge Story, even in regard to the bailee himself, was probably limited to cases where the bailor came to the possession of the goods by right; for, if he came to them by wrong, it would seem that the owner might reclaim them from any person in whose possession they were found. But the doctrine itself may now be justly deemed over-ruled, and the right of the owner to recover his property in all cases against a person having no title, whether a bailee or not, and whether a first or a second bailee, seems now fully established in our law, for the reason that the bailee can never be in a better situation than his bailor. (Taylor *v.* Plumer, 3 M. & S. 562.) If the latter has no title, the real owner is entitled to recover the property, in whose hands soever it may be. (Id. Ibid. Wilson *v.* Anderton, 1 B. & Adol. 450. Ogle *v.* Atkinson, 5 Taunt. 759.) Recent cases have also decided, that, if a bailee of goods for a particular purpose transfers them in contravention of that purpose, even although it be to a bona fide vendee without notice, the latter cannot resist the claim of the owner. (Wilkinson *v.* King, 2 Camp. N. P. C. 335; Loeschman *v.* Machin, 2 Stark. N. P. C. 311; and see Hurd *v.* West, 7 Cowen R. 752.) By a recent statute, however, if a bailee has a lien, the owner cannot recover the thing bailed from him to whom it has been improperly transferred, without first discharging the amount of the lien. (6 Geo. 4, c. 90.) If a bailor, after a deposit, transfers to another person his right to the thing deposited, the latter cannot, it is said, compel a delivery to himself, but the bailee, if he chooses, may deliver it to the person to whom it is transferred, and it will be a justification. (Rich *v.* Aldred, 6 Mod. 216, quære.) But, if A. delivers goods to B. to be delivered over to C., there C. hath the property, and may demand the goods; for, B. undertakes to make the delivery to C., and hath no interest or claim but for that purpose. (Bac. Abr. Bailment, D. 2 Bulst. 68. Roll. Abr. Detinue, C. 606. 9 Hen. 658.) But, in such cases, there must be a clear assent on the part of B. to such undertaking; for, the mere receipt of the goods will not always be sufficient to establish such assent. It has been settled by several modern decisions, that, in case of a remittance of a bill to an agent or banker with directions to apply part of it to the payment of a debt due to a third person, the mere fact of the receipt of the remittance does not, unless the remittee assents to such disposition of the proceeds, and agrees to pay over the same to the creditor, amount to such an appropriation of the proceeds as will enable such creditor to recover the same against the remittee. And the same principle has been applied to a consignment of goods for sale with directions to make

we learn from the story of Glaucus, who, on consulting the oracle, received his answer, "that it was.

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payment of a debt due out of the proceeds. (Williams v. Everett, 14 East, 582. Wedlake v. Hurley, 1 Cr. & Jervis, 83. Yates v. Bell, 3 B. & Ald. 643. Stewart v. Fry, 7 Taunt. 339. Grant v. Austen, 3 Pri. 58. Tiernan v. Jackson, 5 Pet. S. C. Rep. 580.)

It has been further asserted to be law (though it is open to much question,) that, if goods are delivered to a bailee, to be delivered over to another, and afterwards an action be brought against him by one who hath a right to the goods, the defendant may, pending the action, deliver over the goods to the person to whom upon the bailment they were deliverable, and he will be discharged. (Fitz. N. B. 138 M. Bac. Abr. Bailm. D. Roll. Abr. Detinue, D. 607.) But a bailor, where the delivery over is not for a valuable consideration, may at any time countermand his bailment, and, after such countermand, the delivery over by his bailee will not be good. (Bac. Abr. Bailm. D.)

If a bailee delivers the goods to a second bailee, the first bailee may demand and recover the same from the second bailee; because the latter hath possession of the former, and undertakes for the custody. But the original bailor may also demand and recover the same from either bailee, because he has the property, and both are bound to answer him. (Isaac v. Clarke, 2 Bulst. 306, 312, per Coke, C. J. Bac. Abr. Bailm. D. Roll. Abr. Detinue, C. p. 606. 9 Hen. 6, 58. See Gosling v. Birnie, 5 Moore & P. 160, 7 Bing. 339.) If the second bailee has delivered the goods to the original bailor, it is said that it is no bar to a suit by the first bailee against him. (Roll. Abr. Detinue, C, 606. 9 Hen. 6, 58.) But this doctrine seems at all times to have been questionable. (See Flewellin v. Rave, 1 Bulst. 69.) And it may now be considered as entirely exploded by the recent authorities. (Ogle v. Atkinson, 5 Taunt. 759. Wilson v. Anderton, 1 B. & Adol. 430. Whittier v. Smith, 11 Mass. R. 211.) If the bailee should lose the goods bailed, and a stranger finding them should deliver them to the bailor, there the the finder would not be liable to the bailee, for he does not come in in privity under the bailment. (Roll. Abr. Detinue, C. 606, 607.) But it is said, that, if a recovery is had by a third person against a stranger so finding the goods, he will still be liable to the true owner of them in an action; for, it is no answer to the owner that another has recovered from the finder what he had no right to. (Roll. Abr. Detinue, C. 607. Bac. Abr. Bailm. D.) Whenever such a question shall again arise, it may probably be thought worthy of further consideration, especially if the finder has had no notice of the true ownership.

Where a deposit has been made by a servant in behalf of his master, the goods are to be re-delivered to the master; especially if he gives notice that they should not be re-delivered to the servant. But a delivery back to the servant would in many cases, and especially where there was no reason to suspect impropriety, be a good discharge.

No right of action, however, accrues in any cases against the bailee without reward, unless there has been some wrongful conversion, or loss by the gross

criminal even *to harbour a thought* of withholding deposited goods from the owners, who claimed them;"(*f*) and a fine application of this *universal* law is made by an Arabian poet contemporary with Justinian, who remarks, "that life and wealth are only *deposited* with us by our Creator, and, *like all other deposits*, must in due time be restored."(22)

(*f*) Herod. VI. 86. Juv. Sat. XIII. 199.

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negligence of the bailee, until after a demand made upon him, and a refusal by him to re-deliver the deposit. A demand and refusal is ordinarily evidence of a conversion, unless the circumstances constitute a just excuse or a justification of the refusal. (Brown *v.* Hotchkiss, 9 Johns. R. 361.)

In cases of joint deposit, where there are many owners, and the depositary is one, it seems, that, if either of the owners gets the deposit out of his possession against his will, he is remediless; for, it has been decided, that, in such a case, he cannot recover back the deposit, although the delivery is upon a special trust for all the owners, and although he has given a bond for the safe custody of it, on the ground that one tenant in common cannot maintain an action against another. (Holliday *v.* Camsell, 1 T. R. 658.) Of this last decision it has been remarked, that, if it is correct, it is full of hardship and inconvenience. It is full of hardship, for it takes away from the depositary the means of preserving his exclusive possession and safe custody, and yet does not seem to exonerate him from responsibility for such safe custody under his bond. It is full of inconvenince, for it prevents joint owners, in case of any personal distrust, from protecting their several rights by a mutual deposit for the joint benefit, in the custody of one enjoying the respect and confidence of all. It enables one owner, in violation of his contract, by fraud and stratagem, to put at hazard the joint property, or even to apply it to purposes wholly against the object for which it is held. (Story, 78—87.) As to larceny by a bailee, see 1 Hawk. P. C. 1446. State *v.* Long, 1 Hayw. Rep. 155. If a chattel be taken from a bailee by virtue of a paramount title, as an execution, it is a good defence to an action by the bailor. Edson *v.* Weston, 7 Cowen R. 278.

(22) Where a party comes lawfully to the possession of another person's property by finding, the finder seems bound to the same reasonable care of it as any voluntary depositary *ex contractu*. St. German says, (Doct. & Stud. Dial. 2, ch. 38,) "If a man finds goods of another, if they be after hurt or lost by wilful negligence, he shall be charged to the owner. But, if they be lost by other casualty, as, if they be laid in a house that by chance is burned, or, if he deliver them to another to keep that runneth away with them, I think he be discharged." In Isaac *v.* Clarke, (2 Bulst. 306, 312; S. C. 1 Roll. R. 125, 130,) Lord Coke declared,

II. Employment by *commission* was also known to our ancient lawyers; and Bracton, the best writer of them all, expresses it by the Roman word, *mandatum;* now, as the very essence of this contract is, the *gratuitous* performance of it by the bailee, and, as the term *commission* is also pretty generally applied to bailees who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word *mandate* as appropriated *in a limited sense* to the species of bailment now before us; nor will any [53] confusion arise from the common acceptation of the word in the sense of a judicial command or precept, which is, in truth, only a *secondary* and inaccurate usage of it. The great distinction, then, between one sort of *mandate* and a *deposit*, is, that the former *lies in fesance*, and the latter, simply *in custody*:(23) whence, as we have already intimated, a difference often arises between the degrees of care demanded in the one contract and in the other; for, the mandatary being considered as having engaged himself to use *a degree of diligence and attention adequate to the performance of his undertaking*, the omission of such

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that, "if a man finds goods, an action on the case lies for his negligent keeping of them, but not trover or conversion, because this is but a nonfesance." And this seems the true doctrine of the law; for, though a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner, yet, when he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods. And the least degree of care known to our law, that is, slight diligence, may well be required of him, being that which is applied to gratuitous acts of kindness. (Story, 61.)

(23) The true distinction between them is, that, in the case of a deposit, the principal object of the parties is the custody of the thing, and the service and the labour are merely accessorial; in the case of a mandate, the services and labour are the principal objects of the parties, and the custody of the thing is merely accessorial. (Story, 103.)

diligence may be, according to the nature of the business, either *ordinary*, or *slight* neglect; although a bailee of this species ought regularly to be answerable only for a violation of *good faith*. This is the common doctrine taken from the law of Ulpian; but there seems, in reality, to be no exception in the present case from the general rule; for, since *good faith* itself obliges every man *to perform his actual engagements*, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damage, nor *omit* any thing, however inconsiderable, which the nature of the act requires (*g*): nor will a want of ability to perform the contract be any defence for the contracting party; for, though the law *exacts no impossible things*, yet it may justly require that every man should know his own strength before he undertakes to do an act, and that, if he delude another by false pretentions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a *special* agreement to be answerable even for casualties; but
[54] that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or, its equivalent (23,) *gross* neglect.

(*g*) Lord Raym. 910.

(23) Vide ante, p. 43, n. 17.

A distinction seems very early to have been made in our law between the *non*feasance and *mis*feasance of a *conductor operis*, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *had not built it*, the court gave judgment of nonsuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable.(*h*) However, in a subsequent reign, when a similar action was commenced against one Watkins for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which Chief Justice Babington at length interrupted by ordering the defendant's counsel either to plead or to demur; but Serjeant Rolf chose to plead specially, and issue was taken on a *discharge* of the agreement.(*i*) Justice Martin objected to the action, because no tort was alleged; and he persisted warmly in his opinion, which seems not wholly irreconcilable to that of his two brethren; for, in the cases which they put, a special injury *was* supposed to be occasioned by the non-performance of the contract.

Distinction between *non*feasance and *mis*feasance.

[55]

Authority and reason both convince me, that Martin, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as

(*h*) Year B. 11 Hen. IV. 33. [There is an earlier case to the same point Year. B. 2 Hen. IV. 3 b.]

(*i*) Year B. 3 Hen. IV. 36 b. 37 a. Stath. Abr. tit. Accions sur le cas, pl. 20. [This case is translated in 3 Johns R. 90.]

Justice Cokain and the Chief Justice seem to have understood him, that no such action would lie for *non*feasance, even *though special damage had been stated.* His argument was, that the action before them *sounded in*
[56] *covenant* merely, and required a specialty to support it; but that, if the covenant had been changed into a *tort*, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of *mis*feasance, but did not controvert the instances which were given by the other judges.

It was not alleged, in either of the cases just cited, that the defendant was to receive *pay* for the feasance of his work; but, since both defendants were described as *actually in trade*, it was not, perhaps, intended, that they were to work *for nothing*. I cannot, however, persuade myself, that there would have been any difference, had the promises been purely *gratuitous*,(25) and had the special injury been caused by the breach of them. Suppose, for instance, that Robert's cornfields are surrounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish; and that Robert informed his neighbour Henry of his intention speedily to clear the ditch, Henry offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own grounds: if, in this case, Henry neglect to do the work undertaken, "and the water, not having its natural course, overflow the fields of Robert, and spoil

(25) No consideration, or undertaking to pay, being alleged, the promises, for the purpose of adjudication, could be regarded only as gratuitous.

his corn," may not Robert maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments that might be supposed, where a just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss which he sustained;(*k*) for it is, as it ought to be, a general rule, that, for every *damnum injuria datum*, an action of some sort, which it is the province of the pleader to devise, may be maintained; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of Paulus, *Adjuvari nos, non decipi, beneficio oportet:*(*l*) but the *special* damage, not the assumption, is the cause of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he cannot perform the work, no process of law can enforce the performance of it. [57]

A case in Brooke, made complete from the Year-Book, to which he refers, *seems* directly in point; for, by Chief Justice Fineaux, *it had been adjuged*, that, "if a man assume to build a house for me by a certain day, and do not build it, *and I suffer damage by his nonfeasance*, I shall have an action on the case, as well as if he had *done it amiss:*" but it is *possible* that Fineaux might suppose a consideration, though none be mentioned.(*m*) (26)

(*k*) Year B. 19 Hen. VI. 49.
(*l*) D. 13. 6. 17. 3.
(*m*) Bro. Abr. tit. Action Sur le Case, 72.

(26) For a full examination of the distinction in the text, the reader is referred to the cases of Elsee *v.* Gatward, 5 T. R. 143; Thorne *v.* Deas, 4 Johns. R. 84, and the cases there cited; 2 Kent. Comm. 569; Story Comm. 119; Smedes *v.* Utica Bank, 3 Cowen R. 662, S. C. 20 Johns. R. 372; Wilkinson *v.* Coverdale, 1 Esp. N. P. C. 75.

Actions on this contract are, indeed, very uncommon, for a reason not very extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation*: but, whether the case really happened, or the reward, which had actually been stipulated, was omitted in the declaration, the question, "whether a man was responsible for damage to certain goods, occasioned by his negligence in performing a *gratuitous* promise," came before the court in which Lord Holt presided, so lately as the second year of Queen Anne; and a point which the first elements of the Roman law have so fully decided that no court of judicature on the continent would suffer it to be debated, was thought in England *to deserve*, what it certainly received, *very great consideration*.(n)

Case of Coggs and Bernard.

The case was this: Bernard had assumed *without pay* safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff Coggs, a motion was made in arrest of judgment, on the irrelevancy of the declaration, in which it was neither alleged that the defendant was to have *any recompense for his pains*, nor that
[59] he was a *common porter*: but the court were unanimously of opinion that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

The Chief Justice, as it has before been intimated,(o)

(n) Ld. Raym. 909—920. 1 Salk. 26. Comm. 133. Farr. 13, 131, 528.
(o) Page 35.

pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into *six* sorts, and gave a history of the principal authorities concerning each of them. This argument is justly represented by my learned friend, the annotator *on the First Institute*, as "a most masterly view of the whole subject of bailment;"(*p*) and, if my little work be considered merely as a commentary on it, the student may, perhaps, think that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist that the point was *not new*, but had already been determined; that the writ in the Register, called, in the strange dialect of our forefathers, *De pipa vini carianda*,(*q*) was not similar, but identical; for, had the reward been the *essence* of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day, the year, and other circumstances; of which Rastall exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickset hedge*, which the defendant had promised to raise, *without any consideration alleged;* and issue was joined on a traverse of the negligence and improvidence.(*r*) How any answer could have been given to these authorities, I am at a loss even to conceive; but although it is needless to prove the same thing twice, yet other au- [60]

(*p*) Harg. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

(*q*) Reg. Orig. 110. a. see also 110 b. De equo infirmo sanando, and De columbari reparando.

(*r*) Rast. Entr. 13 b.

thorities, equally unanswerable, were adduced by the court, and, supported with reasons no less cogent; for, *nothing*, said Mr. Justice Powell emphatically, *is law that is not reason;* a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of Titius may, and frequently does, differ from the reason of Septimius, no man who is not a lawyer would ever know how to act, and no man who is a lawyer would in many instances know what to advise, unless courts were bound by *authority* as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now, the *reason* assigned by the learned judge for the cases in the Register and Year-Books, which were the same with Coggs and Bernard, namely, "that the party's *special* assumpsit and undertaking obliged him *so* to do the thing that the bailor came to no damage
[61] by his neglect," seems to intimate, that the omission of the words *salvo et secure* would have made a difference in this case, as in that of a *deposit;* but, I humbly contend that those words are implied by the nature of a contract which lies *in fesance*, agreeably to the distinction with which I began this article. As judgment, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court; but I cannot think that the narrowness of the proposition in this instance affects the general doctrine which I have presumed to lay down; and, in the strong case of the shepherd, *who had a flock to keep*, which he *suffered through negligence to be drowned*, neither a *reward* nor a *special*

undertaking are stated:(s) that case, in the opinion of Justice Townsend, depended upon the distinction between a bargain *executed* and *executory:* but I cannot doubt the relevancy of an action in the second case, as well as the first, *whenever actual damage is occasioned by the nonfesance.*(t) (27)

There seems little necessity after this to mention the case of Powtuary and Walton, the *reason* of which [62] applies directly to the present subject; and, though it may be objected that the defendant was stated as a *farrier*, and must be *presumed* to have acted *in his trade*, yet Chief Justice Rolle intimates no such presumption, but says expressly, that "an action on the case lies upon this matter, *without alleging any consideration:* for, the *negligence* is the cause of action, and not the assumpsit."(u)

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work:*(28) and, there being nothing to take it out of

(s) Year B. 2 Hen. VII. 11. The allegation of negligence implies, that the shepherd acted upon the mandate. It was therefore not a case of nonfesance, but like that referred to in the Register, and in the Year-Books.—T.

(t) Stath. Abr. tit. Accions sur le cas, pl. 11. By Justice Paston, "si un ferrour face covenant ove moy de ferrer mon chival, jeo die qe sil *ne ferra* mon chival, uncore jeo averai accion sur mon cas, qar en son default peraventure mon chival est perie." [This case is distinguishable; for a farrier, like a common carrier, or innkeeper, is bound by law to perform certain duties, for which he is entitled to a recompense; but where no such obligation results from the particular situation of the party, a consideration must be alleged, in order to render him liable. Elsee v. Gatward, 5 T. R. 149.]

(u) 1 Ro. Abr. 10.

(27) Vide ante, p. 57, n. 26.

(28) Vid. Percy v. Millandon (opinion of Porter, J.) 20 Martin (Lou.) Rep. 77. Shiells v. Blackburne, 1 H. Bl. 158. Moore v. Mourgue, Cowp. 480. Nelson v. Mackintosh, 1 Stark. N. P. C. 237. Rooth v. Wilson, 1 B. & Ald. 59. Tracy v. Wood, 3 Mason 132. Foster v. Essex Bank, 17 Mass. R. 459. Tompkins v. Saltmarsh, 14 Serg. & R. 275. Stanton v. Bell, 2 Hawks. N. C. Rep.

the general rule, I cannot conceive that the bailee is responsible for *less* than *gross* neglect, unless there be a *special* acceptance: for instance, if Stephen desire Philip to carry a diamond ring from Bristol to a person in London, and he put it, *with bank notes of his own*, into a letter-case, out of which it is *stolen* at an inn, or seized by a robber on the road, Philip shall not be answerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but if he were to secrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chase, I think he would be bound, in case of a loss
[63] by stealth or robbery, to restore the value of it to Stephen: every thing, therefore, that has been expounded in the preceding article concerning *deposits*, may be applied exactly to *this sort* of bailment, which may be considered as a subdivision of the second species.(29)

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146. Story Comm. 127. 2 Kent. Comm. 569. The weight of common law authority seems to be opposed to the distinction taken by Sir W. Jones, though it would seem to be justified by commentators on the civil law.

(29) In cases of general mandate, the fact that the party did the work on the bailment with the same care that he did the work on like goods of his own, would repel the imputation of any negligence. (Lane v. Cotton, 1 Ld. Raym. 646. Kettle v. Bromsale, Willes, R. 121.) But, without doubt, the presumption may be overcome by proofs of actual negligence, (Rooth v. Wilson, 1 B. & Ald. 59,) or of conduct which, though applied to his own goods as well as those bailed, would be deemed negligent in a bailee without hire of ordinary prudence. Of the former position, the case of a person gratuitously undertaking to carry a diamond ring, and putting it with bank notes of his own into a letter-case, affords an apt illustration. (Jones, supra, 62.) The other position is illustrated by the case of Tracy v. Wood, 3 Mason R. 132. A. undertook gratuitously to carry two parcels of doubloons for B. from New York to Boston, in a steamboat by way of Providence. A. in the evening (the boat being to sail early in the morning) put both bags of doubloons, one being within the other,

Since we have nothing in these cases analagous to the judgments of *infamy*, which were often pronounced at Rome and Athens, it is hardly necessary to add, what appears from the speech of Cicero for S. Roscius, of Ameria, that "the antient Romans considered a mandatary as *infamous* if he broke his engagement, not only by actual *fraud*, but even by *more than ordinary negligence.*"(w)

(w) In privatis rebus, si quis rem *mandatam* non modo *malitiosius* gessisset, sui quæstus, aut commodi causa, verum etiam *negligentius*, eum majores summum admisisse dedecus existimabant: itaque *mandati* constitutum est judicium, non minus turpe quam *furti*." Pro S. Rosc. p. 116. Glasg.

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into his valise with money of his own, and carried it on board the steamboat, and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A. went away in the evening, and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered, on opening his valise, that one bag was gone, and he gave an immediate alarm and ran up from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and, on his return, the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not gross negligence, although the bailee's own money was in the same valise. The jury was directed to consider whether the party used such diligence as a gratuitous bailee ought to use under such circumstances. They found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

It scarcely requires to be stated, that the degree of care which a mandatary may be required to exert, must be materially affected by the nature and value of the goods, and their liability to loss or injury. Lord Stowell, in the case of The Rendsberg, (6 Rob. 142, 155,) put a case in point. "If," said he, "I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss, though his pocket were picked in the way. But, if, instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable; because he would be guilty of negligentia maliticsa, in doing that from which the law must infer that he intended the event which has actually taken place." Perhaps the best general test is, to consider whether the mandatary has omitted that care which bailees without hire, or other

Exceptions to the rule.

As to *exceptions* from the rule concerning the degree of neglect for which a mandatary is responsible, almost all that has been advanced before, in the article of *deposits*, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent person, and *without his knowledge*, is the negotiorum gestor(30) of the civilians, and the obligation resulting from his implied contract has been incidentally mentioned in a preceding page.(31)

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Law of loans for use.

III. On the third species of bailment, which is one of the most usual and most convenient in civil socie-

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mandataries of common prudence, are accustomed to take of property of the like description. (Story, 134.) But even though the bailee uses due care, if he misapplies the property to purposes inconsistent with the design of the bailment, he is liable in case of loss or accident. Noy's Maxims, 91. De Tollemere *v.* Fuller, 1 S. C. Const. R. 121. Catlin *v.* Bell, 4 Camp. 183. Ulmer *v.* Ulmer, 2 Nott & M'Cord, 489. Story Comm. 137.

(30) The case of Nelson *v.* Macintosh (1 Stark. N. P. C. 237) approaches very near to that of the negotiorum gestor. A master of a ship had gratuitously taken charge of and received on board of his vessel a box containing doubloons and other valuables belonging to a passenger, who was to have worked his passage, but was accidentally left behind. During the voyage, the master opened the box, in the presence of the passengers, to ascertain its contents, and whether there were contraband goods in it; and he took out the contents and lodged them in a bag in his own chest in his cabin, where his own valuables were kept. After his arrival in port, the bag was missing. The master was held responsible for the loss, on the ground that he had imposed upon himself the duty of carefully guarding against all perils to which the property was exposed, by means of the alteration in the place of custody, although, as a bailee without hire, he might not otherwise have been bound to take more than a prudent care of them; and that he had been guilty of negligence in guarding the goods.

(31) As to the interest of the bailee, in a case of deposit or mandate, in the thing bailed, and his right of action against such as take away or injure it, see the observations of Mr. Justice Story, together with his examination of the adjudged cases, particularly those of Miles *v.* Cattle, 4 Moore & P. 630. 6 Bing. 743, in Comm. 71. 108.

ty, little remains to be observed, because our own and the Roman law are on this head perfectly coincident. I call it, after the French lawyers, *loan for use*, to distinguish it from their *loan for consumption*, or the *mutuum* of the Romans; by which is understood *the lending of money, wine, corn, and other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity:*(x) this latter contract, which, according to St. German, is most properly called *a loan*, does not belong to the present subject; but it may be right to remark, that, *as the specific things are not to be returned, the absolute property of them is transferred to the borrower, who must bear the loss of them if they be destroyed by wreck, pillage, fire, or other inevitable misfortune.*(32) Very different is the nature of the bailment in question; for, [65] a horse, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the use of the bailee, ought

(x) Doct. and Stud. dial. 2, chap. 38. Bract. 99 a, b. In Ld. Raym. 916, where this passage from Bracton is cited by the Chief Justice, *mutuam* is printed for *commodatam;* but what then can be made of the words "ad *ipsam* restituendam?" There is certainly some mistake in the passage, which must be very ancient, for, the oldest MS. that I have seen is conformable to Tottel's edition. I suspect the omission of a whole line, after the word precium, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from Justinian, whom Bracton copied. "At is, qui *mutuum* accepit, obligatus remanet," si forte incendio, &c. Inst. 3, 13, 2.

(32) If money, corn, wine, or any such thing which cannot be re-delivered or occupied, be borrowed, and it perish, it is at the peril of the borrower. But, if a horse, or cart, or such other things as may be used and delivered again, be used according to the purpose for which they were lent, if they perish he who owns them shall bear the loss, if they perish not through default of him who borrowed them, or he made a promise at time of the delivery to re-deliver them safe again. If they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner, he who borrowed them shall be charged with them in law and conscience. Npy's Maxims, 91—Bythewood's ed. 211.

to be re-delivered *specifically;* and the owner must abide the loss if they perish through any accident which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impossibility*, "which the law," says the rule, "never demands;" for, that maxim relates merely to things *absolutely* impossible; and it was not only very possible but very expedient, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it; if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care than that of which *such* a person was capable; as, if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection which he would expect from a riding-master, or an officer of dragoons.(*y*)

From the rule, that a borrower is answerable for *slight* neglect, compared with the distinction before
[66] made between simple *theft* and *robbery*,(*z*) it follows, that, if the borrowed goods be *stolen* out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove that they were purloined notwithstanding his *extraordinary* care. The example given by Julian is the first and best that occurs: Caius borrows a silver ewer of Titius, and afterwards delivers it, that it may be safely restored,

(*y*) Dumoulin, tract. De eo quod interest, n. 185. (*z*) See p. 44, and n. (*a*)

to a bearer of such approved fidelity and wariness that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, Caius appears to be wholly blameless, and Titius has suffered damnum sine injuria. It seems hardly necessary to add, that the same care which the bailee is bound to take of the *principal* thing bailed must be extended to such *accessory* things as belong to it and were delivered with it: thus, a man who borrows a watch, is responsible for *slight* neglect of the chain and seals.

Opinion of Puffendorf disputed.

Although the laws of Rome, with which those of England in this respect agree, most expressly decide, that a borrower using more than ordinary diligence *shall not be chargeable, if there be a force which he cannot resist*,(a) yet Puffendorf employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion, namely, "that the borrower ought to indemnify the lender, if the goods lent be [67] destroyed by fire, shipwreck, or other inevitable accident, and *without his fault*, unless *his own* perish with them:" for example, if Paul lend William a horse worth thirty guineas, to ride from Oxford to London, and William be attacked on a heath in that road by highwaymen, who kill or seize the horse, he is obliged, according to Puffendorf and his annotator, to pay thirty guineas to Paul. The justice and good sense of the contrary decision are evinced beyond a doubt by M. Pothier, who makes a distinction between those cases where the loan was the *occasion* merely of damage to the lender, who might in the mean time have sustained a loss from other accidents, and those

(a) D. 44. 7. 1. 4. Ld. Raym. 916.

where the loan was the sole efficient *cause* of his damage;(*b*) as, if Paul, having *lent* his horse, should be forced in the interval by some pressing business to *hire* another for himself; in this case, the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience *caused* by the loan; for, in this sense and in this instance, *a benefit conferred should not be injurious to the benefactor.* As to a condition *presumed* to be imposed by the lender, that he would not abide by any loss *occasioned* by the lending, it seems the wildest and most unreasonable of presumptions: if Paul
[68] really intended to impose such a condition, he should have declared his mind; and I pursuade myself that William would have declined a favour so hardly obtained.

Cases and distinctions.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for, *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case cited by St. German from the Summa Rosella, where a *loan* must be meaned, though the word *depositum* be erroneously used;(*c*) and it is there decided, that, if the borrower of a horse will imprudently ride by *a ruinous house in manifest danger of falling*, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but

(*b*) Poth. Prêt à Usage, n. 55. Puf. with Barbeyrac's notes, l. 5, c. 4, § 6.
(*c*) Doct. & Stud. where before cited.

that, if the house were *in good condition* and *few* the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger reason, if William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any *accident* that may befal the horse in his journey to Bath, or after the expiration of the week.(*d*) (33).

Thus, if Charles, in a case before put,(*e*) wear the masked habit and jewels of George at the ball for which they were borrowed, and be *robbed* of them in his return home at the usual time and by the usual way, he cannot be compelled to pay George the value of them; but it would be otherwise if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by Gaius in the Digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender if the plate be lost by accident however irresistible.(34)

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(*d*) Ld. Raym. 915. (*e*) Page 50.

(33) Noy's Maxims, 92; Bythewood's ed. 212.

(34) The right of using the thing bailed is strictly confined to the use expressed or implied in the particular transaction, and the borrower, by any excess, will make himself responsible. Lord Holt has put several cases to illustrate this doctrine. If a man lends another a horse to go westward, or for a month, and the bailee goes northward, or keeps the horse above a month, if any accident happens on the northern journey, or after the expiration of the month, the bailee will be chargeable, because (says he) he has made use of the horse contrary to the use he was lent under, and it may be if the horse had

There are other cases in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of Caius be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer which he has borrowed of Titius, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been preferred had he been the owner of them both: even if his urn be more precious, he must either leave it and bring away
[70] the borrowed vessel, or pay Titius the value of that which he has lost;(35) unless the alarm was so sudden, and the fire so violent, that no deliberation or selection could be justly expected, and Caius had time only to snatch up the first utensil that presented itself.

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been used no otherwise than he was lent, that accident would not have befallen him. Coggs *v.* Bernard, 2 Ld. Raym. 909. De Tollemere *v.* Fuller, 1 Const. Rep. S. C. 121. Vid. De Fonclear *v.* Shottenkirk, 3 Johns. Rep. 170. Bracton, Lib. 3, ch. 2, § 1. Wheelock *v.* Wheelwright, 5 Mass. Rep. 104.

The loan is to be considered as strictly personal, unless, from other circumstances, a different intention may be presumed. If C. lends D. his horse to ride to Boston, this will not authorise D. to allow E. to ride the horse to Boston. But, if a man lends his horses and carriages for a month to a friend for his use, then a use by any of his family, or for family purposes, may be fairly presumed; though not a use for the mere benefit of strangers. Story Comm. 161. Bringloe *v.* Morrice, (1 Mod. R. 210. S. C. 3 Salk. 271.)

(35) Pothier, Traite du Prêt à Usage, n. 56. and such is doubtless the rule of the civil law. Mr. Justice Story combats the position with much force, and Chancellor Kent observes, (2 Comm. 575, note d.) that Pothier's reasoning on the subject is rather refined and artificial, since the plain common sense and justice of the case would dictate that the most valuable articles be first saved. Still if the difference in value between the property of the bailee and that of the lender be not obvious and appreciable at once, it is safest to adhere to the rule of the Civilians. The case itself however is scarcely one likely to arise in practice. Vid. Story Comm. 169 et seq.

Since openness and honesty are the soul of contracts, and since "a suppression of truth is often as culpable as an express falsehood," I accede to the opinion of M. Pothier, that, if a soldier were to borrow a horse of his friend for a battle expected to be fought next morning, and were *to conceal from him that his own horse was as fit for the service*, and if the horse so borrowed were slain in the engagement, the lender ought to be indemnified; for, probably the dissimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged *that he was unwilling to expose his own horse*, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless had generously lent him one, the lender would have run, as in other instances, the risk of the day.(36)

If the bailee, to use the Roman expression, be *in morâ*, that is, if *a legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand;* unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time;(37) or, unless the bailee have legally tendered the thing, and the bailor have put himself *in morâ* by refusing to accept it: [71] this rule extends of course to every species of bailment.

(36) A more simple case of tacit fraud would be, where the soldier borrowed the horse for the next day, concealing the fact of any expected battle, or of any intended use for that purpose; for, the lender might be fairly presumed, in such case, to lend for a journey, or for common use, and not for war. (Story, 168.)

(37) This case would not form an exception in the common law: the refusal would make the borrower liable for all accidents.

Controversy among the Civilians.

"Whether in the case of a *valued loan*, or where the goods lent are *estimated at a certain price*, the borrower must be considered as bound *in all events* to restore either the things lent, or the value of them," is a question upon which the civilians are as much divided as they are upon the celebrated clause in the law Contractus: five or six commentators of high reputation enter the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament.(38) D'Avezan supports the affirmative, and Pothier the negative; but the second opinion seems the more reasonable. The word *periculum*, used by Ulpian, is in itself equivocal; it means *hazard* in general, proceeding either from *accident* or from *neglect;* and in this latter sense it appears to have been taken by the Roman lawyer in the passage which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the Customary Provinces of France, or in England, a borrower can be chargeable for all events *without his consent unequivocally given:* If William, indeed, had said to Paul alternatively, "I promise, on my return to Oxford, *either* to restore your horse *or* to pay you thirty
[72] guineas," he must *in all events* have performed one

(38) In the common law, the controversy would turn wholly upon the construction of the words of the particular contract. The mere estimation of a price would not, of itself, settle the point whether the borrower took upon himself every peril, or any additional peril; but it would be construed as a mere precaution to avoid dispute in case of a loss, unless some other circumstances raised a presumption that the parties intended something more. A case can scarcely be imagined where some circumstance giving a construction one way or other would not be found, to explain the reason for fixing the price. (Story, 176.)

part of this disjunctive obligation;(*f*) but, if Paul had only said, "the horse which I lend you for this journey is fairly worth thirty guineas; no more could be implied from these words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that *extraordinary* diligence which the nature of the contract required.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, Si quid convenit vel plus vel minus, another is, where goods are lent for a use in which the lender has a *common interest* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if Stephen and Philip invite some common friends to an entertainment prepared at their joint expense, for which purpose Philip lends a service of plate to his companion, who undertakes the whole management of the feast, Stephen is obliged only to take *ordinary* care of the plate; but this in truth, is rather the innominate contract, do ut facias, than a proper *loan*.(39) Exceptions to the rule.

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only; as, if a passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; (but [73]

(*f*) Palm. 551.

(39) Vid. De Fonclear v. Shottenkirk, 3 Johns. Rep. 170. The respective interests of the lender and borrower in the thing lent, during the continuance of the possession of the latter, and the right of action for its violation are considered somewhat at length by Judge Story. (Comm. 191. See also Hurd v. West, 7 Cowen R. 752.)

here again, the bailment is not so much a *loan* as a *mandate;*) and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument, without any malice or very culpable negligence, he would not be bound to indemnify the amateur, as he was not in want of the instrument, and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss; and a brother musician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with Despeisses, a learned advocate of Montpelier, and writer on Roman law, that the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

Mosaic and Attic laws.

By the law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence* or the *presence* of the owner; for, says the divine legislator, "if a man borrow ought of his neighbour, and it be hurt or die, *the owner thereof not being with* it, he shall surely make it good; but, if the *owner* thereof *be* with it, he shall *not* make it good:"(*g*) [74] now, it is by no means *certain* that the original word signifies the *owner*, for it *may* signify the *possessor*, and the law *may* import that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but, if it was intended that the borrower should always answer for casualties, *except in the case* (which must rarely happen) of *the owner's*

(*g*) Exod. xxii. 14, 15.

presence, this exception seems to prove that no casualties were meaned but such as *extraordinary* care might have prevented; for, I cannot see what difference could be made by the presence of the owner, if the force productive of the injury were wholly irresistible, or the accident inevitable.

An old Athenian law is preserved by Demosthenes, from which litttle can be gathered on account of its generality and the use of an ambiguous word:(*h*) it is understood by Petit as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The Athenians were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

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IV. As to the degree of diligence which the law requires from a *pawnee*, I find myself again obliged to dissent from Sir Edward Coke, with whose opinion a similar liberty has before been taken in regard to a *depositary*; for, that very learned man lays it down, that, "if goods be delivered to one as a *gage* or *pledge*, and they be *stolen*, he shall be discharged, because *he hath a property* in them: and, *therefore*, he ought to keep them *no otherwise than his own*:"(*i*) I deny the first proposition, the reason, and the conclusion.(40.)

Law of Pledges.

Doctrine of Lord Coke denied.

(*h*) Περὶ ὧν καθυφῆκέ τις, ὁμοίως ὀφλισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ. Reiske's edition, 855. 3. Here the verb καθυφιέναι may imply *slight*, or *ordinary*, neglect; or even *fraud*, as Petit has rendered it.

(*i*) 1 Inst. 89. a. 4 Rep. 83 b.

(40) The opinion of Judge Story, (Comm. 225) founded upon a review of the common law authorities, seems to coincide with that of Lord Coke, though

Since the bailment which is the subject of the present article is beneficial to the *pawnee* by securing the payment of his debt, *and* to the *pawnor* by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to whom a gage or pledge is bailed, to take *ordinary* care of it; and he must consequently be responsible for *ordinary* neglect.(*k*) This is expressly holden by Bracton; and, when I rely on his authority, I am perfectly aware that he copied Justinian almost word for word, and that Lord Holt, who makes considerable use of
[76] his Treatise, observes three or four times, "that he was an *old* author;"(*l*) but, although he had been a civilian, yet he was also a great common lawyer, and never, I believe, adopted the rules and expressions of the Romans, except when they coincided with the laws of England in his time: he is certainly the *best* of our juridical classics; and, as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but, if it remain unimpeached, by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doc-

(*k*) Bract. 99 b. (*l*) Ld. Raym. 915, 916, 919.

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he admits that the latter gives a wrong reason in support of his proposition, and follows it out into an improper conclusion. The true rule seems to be that the pawnee is neither absolutely liable nor absolutely excusable, if the pledge is stolen. Theft, *per se*, suffices neither to charge nor to exonerate the bailee. Such a loss can at most be considered but *prima facie* evidence of neglect—imposing upon the defendant the necessity of destroying the presumption against him. See likewise the reasoning of Chancellor Kent upon the same point, 2 Comm. 579—581. Hargrave, n. (10) to Co. Litt. 89 a.

trine in question has the full assent of Lord Holt himself, who declares it to be "*sufficient* if the pawnee use *true* and *ordinary* diligence for restoring the goods, and that, so doing, he will be indemnified, and, notwithstanding the loss, shall resort to the pawnor for his debt." Now it has been proved, that "a bailee cannot be considered as using *ordinary* diligence, who suffers the goods bailed to be taken by *stealth* out of his custody;"(*m*) and it follows, that "a pawnee shall *not* be discharged, if the pawn be simply *stolen* from him;" but, if he be forcibly *robbed* of it *without his fault*, his debt shall not be extinguished.

The passage in the Roman institutes, which Bracton has nearly transcribed, by no means convinces M. Le Brun that a *pawnee* and a *borrower* are not responsible for *one and the same* degree of negligence; and it is very certain that Ulpian, speaking of the [77] actio pignoratitia, uses these remarkable words: "Venit in hac actione et dolus et culpa *ut* in commodato, venit et custodia; vis major non venit." To solve this difficulty, Noodt had recourse to conjectural emendation, and supposes *ut* to have been inadvertently written for *at;* but if this was a mistake, it must have been pretty ancient, for, the Greek translators of this sentence use a particle of similitude, not an adversative: there seems, however, no occasion for so hazardous a mode of criticism. Ulpian has not said, "talis culpa qualis in commodato;" nor does the word *ut* imply an *exact* resemblance: he meaned, that a pawnee was answerable for *neglect*, and gave the first instance that occurred of another

Conjectural criticism of Noodt.

(*m*) P. 44. n. (*o*)

contract, in which the party was likewise answerable for *neglect*, but left the *sort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himself expressly mentions *pignus* among other contracts *reciprocally useful*, and distinguishes it from *commodatum*, whence the borrower *solely* derives advantage.(*n*)

Case in the Book of Assise.

It is rather less easy to answer the case in the Book of Assise, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break [78] the harmony of my system;(*o*) for, there, in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him *in gage* for a certain sum of money; that he had put it among his other goods; and that all together had been *stolen* from him:" now, according to my doctrine, the plaintiff might have demurred to the plea; but he was *driven* to reply, "that he *tendered* the money before the *stealing*, and that the creditor refused to accept it," on which fact issue was joined; and the reason assigned by the Chief Justice was, that "if a man bail goods to me *to keep*, and I put them among my own, I shall not be charged if they be *stolen*." To this case I answer: first, that, if the court really made no difference between a *pawnee* and a *depositary*, they were indubitably mistaken; for which assertion I have the authority of Bracton, Lord Holt, and St. German, who ranks the taker of a *pledge* in the same class with a *hirer* of goods;(*p*) next, that in a much later case, in the reign of Hen. VI., where a *hiring*

(*n*) Before, p. 16.
(*o*) 29 Ass. pl. 28.
(*p*) Doct. and Stud. dial. 2, chap. 38.

of custody seems to be meaned, the distinction between a *theft* and a *robbery* is taken agreeably to the Roman law;(*q*) and lastly, that although in the strict propriety of our English language, to *steal* is to take *clandestinely*, and to *rob* is to seize by *violence*, corresponding with the Norman verbs *embleer* and *robber*, yet those words are sometimes used inaccurately; [79] and I always suspected that the case in the Book of Assise related to a *robbery*, or a taking *with force;* a suspicion confirmed beyond any doubt by the judicious Brooke, who abridges this very case with the following title in the margin, "Que serra al perde, quant les biens sont *robbes*:(*r*) and in a modern work, where the old cases are referred to, it appears to have been settled in conformity to them and to reason, "that, if the pawn be laid up, and the pawnee be *robbed*, he shall not be answerable:"(*s*) but Lord Coke seems to have used the word stolen in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment*, *the whole property is instantly revested in the pledgor*, and he may consequently maintain an action of trover:(*t*) it is said in a most useful work, that, by

(*q*) Before, p. 44, note (*o*).

(*r*) Abr. tit. Bailment, pl. 7. [Vid. Story, Comm. 227, in allusion to Sir W. Jones' remarks upon the case in the Book of Assise.]

(*s*) 2 Salk. 522.

(*t*) 29 Ass. pl. 28. Yelv. 179. Ratcliff and Davis. [It is laid down by Holt in 2 Salk. 522, that if a pawnbroker refuse upon tender of the money to re-deliver the goods pledged, he may be indicted; for being secretly pawned, it may be impossible to prove a delivery in trover for want of witnesses. This

such tender and refusal, the thing pawned, "ceases to be a pledge and becomes a *deposit;*"(*u*) but this must be an error of impression; for there can never be a deposit without the owner's consent, and a *depositary* would be chargeable only for *gross* negligence, whereas the pawnee, whose special property is determined
[80] by the wrongful detainer, becomes liable *in all possible events* to make good the thing lost, or relinquish his debt.(*w*)

Lord Coke's reasons contested.

The reason given by Coke for his doctrine, namely, "because the pawnee has a *property* in the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any *particular* species; for, every bailee has a temporay *qualified* property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or purloin them.(*x*) By the Roman law, indeed, "even the possession of the depositary was holden to be that of the person depositing;" but with us the general bailee has unquestionably a *limited* property in the goods intrusted to his care: he may not, however, *use* them on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed; and this presumption varies, as the thing is likely to be better, or worse, or not at all affected, by usage; since, if

appears to be the better opinion, though it is made a quære in some of the books. See Carth. Rep. 277. Salk. 309. 1 Hawk. Pl. of Cr. Curwood's Edit. 144. 1 Dane Abr. 305. 1 Bac. Abr. 373.]

(*u*) Law of Nisi Prius, 72. The error here pointed out is corrected in the subsequent editions, by the omission of the words quoted above.—T.

(*w*) Ld. Raym. 917.

(*x*) Year B. 21 Hen. VII. 14 b. 15 a.

Caius deposit a *setting-dog* with Titius, he can hardly be supposed unwilling that the dog should be used for partridge-shooting, and thus be confirmed in those [81] habits which make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarce imagine that he would suffer them to be worn; and, on the other hand, it may justly be inferred that he would gladly indulge Titius in the liberty of using the *books* of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods which will be *impaired* by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee;(41) as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a public place, and be *robbed*

(41) The true rules deducible from the common law authorities, as to how far the pawnee is entitled to use the pawn, seem to be the following:—1. If the pawn is of such a nature that the due preservation of it requires some use, there it is not only justifiable, but it is indispensable to the faithful discharge of the duty of the pawnee. 2. If the pawn is of such a nature, that it will be the worse for the use, such, for instance, as the wearing of clothes which are deposited, there the use is prohibited to the pawnee. 3. If the pawn is of such a nature, that the keeping is a charge to the pawnee, as, if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse, by way of recompense (as it is said) for the keeping: or, (according to another opinion,) crediting the profits of the use to the pawner. 4. If the use will be beneficial to the pawn, or indifferent, there it seems that the pawnee may use it, as, if the pawn is of a setting-dog, it may well be presumed that the owner would consent to the dog's being used in partridge shooting, and thus confirmed in the habits which make him valuable. So, books which will not be injured by a moderate use, may be read, examined, and used by the pawnee. 5. But, if the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly interdicted. (Story, 221.)

of them on her return, she must make them good: "if she keep them in a bag," says a learned and respectable writer, "and they are *stolen*, she shall not be charged;"(*y*) but the bag could hardly be taken *privately and quietly* without her omission of *ordinary* diligence; and the manner in which Lord Holt puts the case establishes my system, and confirms the answer just offered to the case from the Year-Book; for, "if she keep the jewels," says he, *locked up* in her cabinet, and her cabinet be *broken open*, and the
[82] jewels taken thence, she wlll not be answerable."(*z*) Again; it is said, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge;(*a*) and this doctrine must be equally applicable to a general bailee, who ought neither to be injured or benefited in any respect by the trust undertaken by him; but the Roman and French law, more agreeably to principle and analogy, permits, indeed, both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable charges for their nourishment.(*b*) It follows from these remarks, that Lord Coke has assigned an inadequate reason for the degree of diligence which is

(*y*) Law of Nisi Prius, 72—(42.)
(*z*) Ld. Raym. 917.
(*a*) Ow. 124.
(*b*) Poth. Depot, n. 47. Nantissement, n. 35.

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(42) See Finucane *v.* Small, 1 Esp. N. P. C. 315, ante, p. 75, n. 40.

demanded of a pawnee; and the true reason is, that the law requires nothing *extraordinary* of him.

But, if the receiver in pledge *were* the only bailee who had a *special property* in the thing bailed, it could not be logically inferred, "that, *therefore*, he ought to keep it merely *as his own*;" for, even if Caius have an *absolute* undivided property in goods jointly or in common with Septimius, he is bound by rational, as well as positive law, to take *more* care of them *than* [83] *of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use *ordinary* diligence in affairs which interest *another* as well as himself: "Aliena negotia," says the emperor Constantine, "exacto officio geruntur."(*c*)

The conclusion, therefore, drawn by Sir Edward Coke, is no less illogical than his premises are weak. But here I must do M. Le Brun the justice to observe, that the argument on which his whole system is founded, occurred likewise to the great oracle of English law; namely, that a person who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own; and, if that was Le Brun's hypothesis, he has done little more than adopt the system of Godefroi, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts.

Pledges for debt are of the highest antiquity; they were used in very early times by the roving Arabs,

(*c*) C. 4. 35. 21.

one of whom finely remarks, "that the life of man is no more than a *pledge* in the hands of destiny;" and the salutary laws of Moses, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, deserve to be imitated as well as
[84] admired. The distinction between *pledging*, where possession is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally Attic; but scarce any part of the Athenian laws on this subject can be gleaned from the ancient orators, except what relates to bottomry, in five speeches of Demosthenes.

I cannot end this article without mentioning a singular case from a curious manuscript preserved at Cambridge, which contains a collection of queries in Turkish, together with the decisions or concise answers of the Mufti at Constantinople: it is commonly imagined that the Turks have a translation in their own language of the Greek code, from which they have supplied the defects of their Tartarian and Arabian jurisprudence:(*d*) but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded that their numerous treatises on Mahomedan law are worthy, on many accounts, of an attentive examination. The case was this: "Zaid had left with Amru divers goods in pledge for a certain sum of money, and some *ruffians*, having entered the house of Amru took away his own goods, together with those pawned by Zaid." Now we must necessarily suppose that the
[85] creditor had by *his own fault* given occasion to this robbery; otherwise, we may boldly pronounce that

(*d*) Duck de Auth. Jur. Civ. Rom. I. 2. 6.

the Turks are wholly unacquainted with the imperial laws of Byzantium, and that their own rules are totally repugnant to natural justice; for, the party proceeds to ask, "whether, *since the debt became extinct by the loss of the pledge*, and since the goods pawned exceeded in value the amount of the debt, Zaid could legally demand the balance of Amru;" to which question, the great law officer of the Othman court answered with the brevity usual on such occasions, Olmaz, *it cannot be.*(e) This custom, we must confess, of proposing cases both of law and conscience, under *feigned* names to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality, and to save the charges of litigation.(43)

(e) Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. Hywel Dda. lib. 2, c. 2, s. 29, note x. It may *possibly* be the usage in Turkey to *stipulate* "ut amissio pignoris liberet debitorem," as in C. 4. 24. 6.

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(43) To the validity of a pledge it is not indispensable that the pledge should belong to the pledger; it is sufficient if it is pledged with the consent of the owner; and, even without the consent of the owner, the pledge would be valid as between the parties. By the pledge of a thing, not only the thing itself is pledged, but also, as accessory, the natural increase thereof. (Jarvis *v.* Rogers, 13 Mass. R. 105.)

If the pawner has only a limited title to the thing, as, for life or years, he may still pawn it to the extent of his title; but, when that expires, the pawnee must surrender it to the person who succeeds to the ownership. (Hoare *v.* Parker, 2 T. R. 376.)

In respect to negotiable instruments for money, the party lawfully in possession of them, although not the owner, may in general pledge them, as well as sell them absolutely, so as to bind the rights of the owner. (Jarvis *v.* Rogers, 13 Mass. R. 105.) But as to negotiable securities for goods, as, bills of lading, the common law is otherwise, and such a party cannot make a valid pledge of these. [Recent statutes, (4 Geo. 4, c. 83. 6 Geo. 4, c. 94,) have remedied this inconvenience in England.]

To constitute a pledge, there must be an actual delivery. Until the delivery, the pledgee acquires no right of property in the thing. (Bac. Abr. Bailment, B. 2 Roll. R. 439. Cortelyou *v.* Lansing, 2 Caines' Cas. 200. Port-

Law of hiring.

V. The last species of bailment is by no means the least important of the five, whether we consider

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land Bank *v.* Stubbs, 6 Mass. R. 422. Tucker *v.* Buffington, 15 Id. 477.) What will amount to a delivery is a question of law. It need not be an actual manual delivery. (Atkinson *v.* Maling, 2 T. R. 462. Jewett *v.* Warren, 12 Mass. R. 300.) If the pledgee has the thing already in possession, as a deposit, &c., there the very contract transfers to him, by operation of law, a virtual possession as a pledge, the moment the contract is completed. (Story, 202.)

As to the rights of the pawnee.]—In virtue of the pawn, he acquires, by the common law, a special property in the thing. (2 Bl. Com. 396. Jones, 80. Moses *v.* Conham, Ow. R. 123. Ratcliffe *v.* Davis, 1 Bulst. 29. Yelv. 178. Cro. Jac. 244. Coggs *v.* Bernard, 2 Ld. Raym. 909, 916. Bac. Abr. Bailm. B.) If the owner should wrongfully repossess himself of the pawn, the pawnee may maintain a suit for the restitution of the thing itself, or for damages, at his election. If it should be taken from his possession by a stranger, he may sue the stranger in like manner. (2 Saund. R. 47, Wms. n. *b.* Woodruffe *v.* Halsey, 8 Pick. R. 333.) And, in a suit for damages, the pawnee may recover against a stranger the full value of the thing, although it is pledged to him for less, as he will be answerable over to the owner for the excess. (Lyle *v.* Barker, 5 Binn. 457.)

If there are any subsequent accessorial engagements, which either tacitly or expressly are by the parties attached to the pledge, the pledgee has a title and right of possession co-extensive with the new engagements. (Prec. Ch. 419. 2 Vern. 691.) But, the mere existence of a former debt due to the pledgee does not authorise him to detain the pledge for that debt, when it has been put into his hands for another debt or contract, unless there is some presumption that such was the intention of the parties. (4 Burr. R. 2214. 6 T. R. 258. 7 East, 224. 15 Mass. R. 389. 397. 490.) The pledge applies also to all the incidental charges and expenses. If, for instance, it is for a debt, it covers the interest upon the debt; and, if the pawnee is at any expense about the pledge, that also is covered. (Story, 205. 2 Kent. 583.)

If the pledge is not redeemed within the stipulated time by a due performance of the contract for which it is a security, the pawnee has a right to require a sale to be made thereof, in order to have his debt or indemnity. And, if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to a prompt fulfilment of the engagement; and, if the pawner neglects or refuses to comply, the pawnee may, upon due demand, and notice to the pawner, require the pawn to be sold. (Story, 207. Cortelyou *v.* Lansing, 2 Caines' Cas. 304. 5. 2 Kent. 582, and the cases there cited.)

The law of England seems formerly to have required judicial process to justify the sale, or at least to destroy the right of redemption. (Glanville, lib. 10, c. 1. 1 Reeve's Hist. 161, 162.) At present, it leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale, or he may proceed to sell ex mero motu, upon giving due notice of his intention

the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately, examined.

1. Locatio, or locatio-conductio, *rei*, is a contract by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price of the hiring; so that, in truth, it bears a strong resemblance to the contract of emptio-venditio, or *sale:* and, since it is advantageous to *both* contracting parties, the harmo- Hiring of a thing. [86]

to the pledger. And, in the latter case, if the sale is bonâ fide and reasonably made, it will be equally obligatory. (Pothener *v.* Dawson, 1 Holt. N. P. C. 385. Tucker *v.* Wilson, 1 P. Wms. 261; 1 Bro. Parl. Cas. 494. Lockwood *v.* Ewer, 9 Mod. 278. 3 Atk. 303.) In this also, the law in all the United States, save Louisiana, agrees, it is believed, with that of England; but in both countries, notice to the pawner previous to a sale by the pawnee is essential. (Tucker *v.* Wilson, ubi sup. De Lisle *v.* Priestman, 1 Browne, Penn. R. 176.)

If several things are pledged, each is deemed liable for the whole debt or other engagement. If one of them perishes by accident or casualty, without default of the pledgee, he has a right over all the residue for his whole debt or other duty. (Ratcliffe *v.* Davis, Yelv. 178; Bac. Abr. Bailm. B.; Anon. Salk. R. 522.) And the pledgee may sell, not only the things pledged, but all their increments. But, when once he has obtained an entire satisfaction, he can proceed no further; and, if there is any surplus, it belongs to the pledger. (Stevens *v.* Bell, 6 Mass. R. 339.) If the things pawned are insufficient to pay the debt or other duty, the deficiency continues a personal charge on the debtor or other contracting party, and may be recovered accordingly. (South Sea Company *v.* Duncomb, 2 Str. 919.)

The possession of the pawn does not suspend the right of the pawnee to proceed personally against the pawner for his whole debt or other engagement without selling the pawn, for it is only a collateral security. (2 Str. 919. Bac. Abr. Bailment, B. Anon. 12 Mod. 564. Holt, N. P. C. 461.) If the pawner, in consequence of any default or conversion of the pawnee, has recovered back the pawn or its value, still the debt remains, and is recoverable, unless in such prior action it has been deducted. (Ratcliffe *v.* Davis, Yelv. 179. Bac. Abr. Bailm. B. Story. 211, 212.) And it seems, that, by the common law, the pawnee, in such an action for the value, has a right to have the amount of his debt recouped in the damages. (Jarvis *v.* Rogers, 15 Mass. R. 399.) See farther, as to the respective rights and duties of the parties to a pledge, in the use, alienation, loss, or restoration of the property on the one hand, and its redemption on the other, in Story's Comm. 204-246, and the numerous cases there cited.

nious consent of nations will be interrupted, and one object of this essay defeated, if the laws of England shall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the most recent publication that I have read on any legal subject, it is expressly said, "that the hirer is to take *all imaginable* care of the goods delivered for hire:(*f*) the words *all imaginable*, if the principles before established be just, are too strong for practice, even in the strict case of *borrowing;* but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of Lord Holt, in the case of Coggs and Bernard, where the great judge lays it down, "that, if goods are let out for a *reward*, the *hirer* is bound to the *utmost* diligence, such as the *most diligent father of a family* uses."(*g*) It may seem bold to controvert so respectable an opinion; but, without insisting on the palpable injustice of making a *borrower* and a *hirer* answerable for precisely the *same* degree of neglect, and without urging that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the dictum of the Chief Justice was entirely grounded on a grammatical mistake in the translation of a single Latin word.

Lord Holt's doctrine explained.

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In the first place, it is indubitable that his lordship relied *solely* on the authority of Bracton, whose words he cites at large, and immediately subjoins, "*whence it appears*," &c.: now the words, "talis ab eo desideratur custodia, qualem *diligentissimus paterfamilias*

(*f*) Law of Nisi Prius, 3d edition, corrected, 72.
(*g*) Ld. Raym. 916.

suis rebus adhibet," on which the whole question depends, are copied exactly from Justinian,(*h*) who informs us, in the proeme to his Institutes, that his decisions in that work were extracted *principally* from the Commentaries of Gaius; and the epithet *diligentissimus* is, in fact, used by this ancient lawyer,(*i*) *and by him alone*, on the subject of hiring; but Gaius is remarked for writing with energy, and for being fond of using *superlatives* where all other writers are satisfied with *positives*;(*k*) so that his forcible manner of expressing himself, in this instance, as in some others, misled the compilers employed by the Emperor, whose words Theophilus rendered more than literally, and Bracton transcribed; and thus an epithet, which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken harmony of the Pandects with the Institutes, which, together with [88] the Code, form *one connected work*,(*l*) and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. De Ferriere, who imagines that both Justinian and Gaius are speaking only of cases, which *from their nature* demand *extraordinary* care.(*m*)

There is no authority, then, against the rule which requires of a *hirer* the same degree of diligence that *all prudent men*, that is, *the generality of mankind*, use in keeping their own goods,(44) and the just distinc- Rules and remarks.

(*h*) Bract. 62. b. Justin. Inst. 3. 25. 5. where Theophilus has ὁ σφοδρα ἐπιμελεστατος.

(*i*) D. 19. 2. 25. 7.

(*k*) Le Brun, p. 93.

(*l*) Burr. 426.

(*m*) Inst. vol. v. p. 138.

(44) Acc. Dean *v.* Keate, 3 Camp. N. P. C. 4. Millon *v.* Salisbury, 13 Johns.

tion between *borrowing* and *hiring*, which the Jewish lawgiver emphatically makes, by saying, "if it be an hired thing, *it came for its hire*,"(*n*) remains established by the concurrent wisdom of nations in all ages.

If Caius, therefore, hire a horse, he is bound to ride it as moderately, and treat it as carefully, as any man of *common discretion* would ride and treat *his own* horse; and if, through his negligence, as, by leaving the door of his stable open at night, the horse be *stolen*, he must answer for it; but not if he be *robbed* of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as, by travelling at unusual hours, or by taking an unusual road; if, indeed, he hire a carriage and any number of horses, and the
[89] owner send with them his postilion or coachman, Caius is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage, while he sits in it.(45)

Since the negligence of a servant, *acting under his*

(*n*) Exod. xxii. 15.

Rep. 211. Platt *v.* Hibbard, 7 Cowen Rep. 497. Bray *v.* Maine, 1 Gow's R. 1. And the burden of proof of negligence seems to be upon the bailor. Newton *v.* Pope, 1 Cowen Rep. 109. Cooper *v.* Barton, 3 Camp. Rep. 5. 2 Kent. Comm. 587.

(45) If a person hires of a stable keeper, not the carriage but only the horses, and they are driven in the hirer's *own carriage* by a servant of the stable keeper, it is doubtful whether the hirer or the stable keeper is responsible. At Nisi Prius, in Sammell *v.* Wright, (5 Esp. N. P. C. 263,) Lord Ellenborough ruled that the owner of the horses was not responsible. But in a late case, in banc, (Laugher *v.* Pointer, 8 D. & R. 556; 5 B. & C. 545,) the judges were divided, and no judgment was given. Bayley and Holroyd, Js. being of opinion that the hirer (against whom the action was brought) was alone liable, whilst Abbott, C. J., and Littledale, J., thought the owner of the horses alone liable. Upon the principle of fixing the responsibility so as most efficiently to check misfeasance, the latter opinion seems preferable.

master's directions, express or implied, is the negligence of the master,(46) it follows, that, if the *servant* of Caius injure or kill the horse by riding it immoderately, or, by leaving the stable-door open, suffer thieves to steal it, Caius must make the owner a compensation for his loss;(*o*) and it is just the same, if he take a ready-furnished lodging, and his guests or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At Rome the law was not quite so rigid; for, Pomponius, whose opinion on this point was generally adopted, made the master liable only *when he was culpably negligent in admitting careless guests or servants*, whose bad qualities he ought to have

(*o*) Salk. 282. Ld. Raym. 916.

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(46) See Noy's Maxims, c. 44. Bythewood's ed. 217. 1 Bl. Comm. 431. 1 Lord Raymond, 739. Bush *v.* Steinman, 1 Bos. and Pull. 404. Harris *v.* Baker, 4 M. and S. 27. Nicholson *v.* Mounsey, 15 East, 384. Bowcher *v.* Noidstrom, 1 Taun. 568. Ellis *v.* Turner, 8 T. R. 533. But the act must be done in the master's service, and in obedience to his orders, for the master is not responsible for an injury wilfully committed by the servant, without his knowledge or assent. Where a servant of the defendant wilfully drove his chariot against the plaintiff's chaise, by which he was thrown out and considerably hurt, but the defendant was not present, nor did he in any manner direct or assent to the act of the servant, it was decided, that the owner of the chaise could not maintain an action of trespass against the master. M'Manus *v.* Cricket, 1 East, 106. And in a late case, where an action was brought, and damages recovered for an injury sustained by the plaintiff's chariot being overturned by the defendant's carriage, in which it appeared, that the accident arose from the defendant's servant striking the plaintiff's horses when the two carriages were entangled, in consequence of which they moved forward, and the carriage was overturned, this distinction was laid down by the court: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from the difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." Croft *v.* Alison, 4 B. and A. 590.

known:(*p*) but this distinction must have been perplexing enough in practice; and the rule, which, by making the head of a family answerable indiscriminately for the faults of those whom he receives or employs, compels him to keep a vigilant eye on all his domestics, is not only more simple, but more conducive to the public security, although it may be rather harsh in some particular instances.(*q*) It may
[90] here be observed, that this is the only contract to which the French, from whom our word *bailment* was borrowed, apply a word of the same origin; for, the letting of a house or chamber for hire is by them called *bail a loyer*, and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb, *bailler*, to deliver; and, though the contracts which are the subject of this essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as, an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants or implements, that *every prudent person* would use, if the orchard, garden, or farm were his own.

Hiring of *work.*

2. *Locatio operis*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a most extensive influence in civil life; but the principles by which the obligations of the contracting parties may be ascertained, are no less obvious and rational than the objects of the contract are often vast and important.(*r*)

(*p*) D. 19. 2. 11. (*q*) Poth. Louage, n. 193.

(*r*) It may be useful to mention a nicety of the Latin language in the application of the verbs *locare* and *conducere*: the employer who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who re-

If Titius deliver silk or velvet to a tailor for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house,(47) the tailor, the engraver, and the builder, are

ceives the pay, is *locator operarum*, but *conductor operis*. Heineco. in Pand. par. 3, s. 320. So, in Horace,

"Tu secanda marmora
"*Locas*"—

which the stonehewer or mason *conduxit*.

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(47) Contracts of this nature can only arise from the mutual assent of both parties; for persons of the above description are not, like common carriers, innkeepers, or farriers, obliged to perform the work belonging to their respective occupations, but having performed it according to their undertaking, they are entitled to detain the article until they are paid the charges for their workmanship. (Elsee *v.* Gatward, 5 T. R. 150.) The obligation of restoring the subject of the bailment, after the object for which it was deposited has been completed, must therefore be qualified by his right of lien. And in any of the above cases, wherever a debt accrues to the bailee from the bailor, in consequence of the bailment, as when the tailor has made the suit for which the cloth was delivered. (2 Roll. Abr. 92. (M.) pl. 1.;) or the jeweller has set or engraved the seal; or where a horse has been agisted by the farmer or corn ground by the miller, (Chaste *v.* Westmore, 5 M. and S. 180,) the bailee has a lien upon the subject of the bailment, which he cannot be compelled to redeliver until his demand has been previously satisfied. This right, by the common law, attaches only upon the particular article in respect of which the charges have been incurred, but may be extended, by agreement between the parties, to all the articles in the possession of the person entitled to it, not only for the charges with respect to them, but also for charges upon articles previously delivered, but not satisfied. (Kirkman *v.* Shawcross, 6 T. R. 17. Rushforth *v.* Hadfield, 6 East 519, 7 East, 224. Ex parte Deeze, 1 Atk, 228. Green *v.* Farmer, 4 Burr. 2214.) But where a quantity of goods is delivered in separate parcels at different times, yet if the agreement under which the work is done be entire, the right of lien attaches upon each part of the expenses arising with respect to the whole. (Blake *v.* Nicholson, 3 M. and S. 167. Chase *v.* Westmore, 5 M. and S. 181.) A more extended lien, however, may exist by a special agreement between the parties; and where a person has given notice to his employer that he will not take in goods, without having a lien for his general balance, and goods are sent after such notice, then the bailee can detain the bailment until he is paid all that is due to him. Persons also in particular trades, as dyers, bleachers, &c. may join in such resolution, and their customers, who have had notice of it, will be bound by its terms. (Kirkman *v.* Shawcross, 6 T. R. 14.) A bailee, having a qualified property in the subject of the bailment, and being responsible to his bailor for the safe custody of it, may maintain an

not only obliged to perform their several undertakings in a workmanly manner,(*s*) but *since they are entitled to a reward*, either by express bargain or by implication, they must also take *ordinary* care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of themselves or their servants.(48) It has, indeed, been adjudged, that, if the horse of a guest be sent *to pasture* by *the owner's desire*, the innholder is not, *as such*, responsible for the loss of him by *theft* or accident;(*t*) and in the case of Mosley and Fosset, an action against an agister for keeping a horse *so negligently that it was stolen*, is

(*s*) 1 Ventr. 268, erroneously printed, 1 Vern. 268, in all the editions of Bl. Com. ii. 452. The innumerable multitude of inaccurate or idle references, in our best reports and law tracts, is the bane of the student and of the practiser.

(*t*) 8 Rep. 32. Calye's case.

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action for any injury which it may sustain. The bailor may also have an action, but not both of them, for he that first begins the action must go on with it, and judgment obtained by one is good bar to the action of the other. (Flewellin *v.* Rave, 1 Bulstrode, 69. Rooth *v.* Wilson, 1 Barn. and Ald. 59. 1 Wms'. Saund. 47 *e.* n. 1. 2 Bl. Comm. 395. 2 Roll. Abr. 92, M. 1. Blake *v.* Nicholson, 3 M. & S. 167. Chase *v.* Westmore, 5 M. & S. 180. Ex parte Deese, 1 Atk. 228. Kirkman *v.* Shawcross, 6 T. R. 14. Rushforth *v.* Hadfield, 6 East, R. 519; 7 East, R. 224. Story, 287.)

(48) So, too, a watchmaker, having a watch left with him for repairs, is obliged to use ordinary diligence in keeping it; and, if he uses less, and the watch is lost, he is liable for the value in damages. (Clark *v.* Earnshaw, 1 Gow, N. P. C. 30.) And a workman is not only bound to guard the thing bailed against ordinary hazard, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed. (Leck *v.* Maester, 1 Camp. N. P. C. 138.) Agisters of cattle are within the same rule; and it is ordinary negligence for them to leave open the gates of their field, so that the cattle stray or are stolen. (Broadwater *v.* Bolt, Holt, N. P. C. 541.)

said to have been held maintainable *only* by reason of a *special* assumption;(*u*) but the case is differently reported by Rolle, who mentions no such reason; and, according to him, Chief Justice Popham advanced generally in conformity to the principles before established, that, "if a man, to whom horses are bailed for agistment, *leave open the gates of his field*, in consequence of which neglect they stray and are *stolen*, the owner has an action against him:" it is the same if the innkeeper send his guest's horse to a meadow *of his own accord;* for he is bound to keep safely all such things as his guests deposit *within his inn*,(49) and shall not discharge himself by his own act from that obligation; and even when he turns out the horse *by order of the owner*, and receives pay for his grass and care, he is chargeable, surely, for *ordinary* negligence, as *a bailee for hire*, though not *as an innkeeper*, by the general custom of the realm. It may be worth while to investigate the reasons of this *general custom*, which, in truth, means no more than *common law* concerning innholders.(*w*)

Law concerning innholders.

Although a stipend or reward in *money* be the essence of the contract called *locatio*, yet the same responsibility for neglect is justly demanded in any of the *innominate* contracts, or whenever a valuable consideration of any kind is given or stipulated. This is the case where the contract *do ut des* is formed by a *reciprocal bailment for use;* as, if Robert permit Henry to use his *pleasure-boat* for a day, *in consideration* that Henry will give him the use of his *chariot* for the

[93]

(*u*) Mo. 543. 1 Ro. Abr. 4. (*w*) Reg. Orig. 105. a. Noy, Max. ch. 43.

(49) See post, p. 94, n. 50.

same time; and so in ten thousand instances that might be imagined of *double bailments;* this, too, is the case if the *absolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as, if Charles give George a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works*; as, if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract do ut facias, or facio ut des; and, in all these cases, the bailees must answer for the omission of *ordinary* diligence in preserving the things with which they are intrusted: so, when Jacob undertook the care of Laban's flocks and herds for no less a reward than his younger daughter,
[94] whom he loved so passionately, *that seven years were in his eyes like a few days*, he was bound to be just as vigilant as if he had been paid in shekels of silver.

Now, the obligation is precisely the same, as we have already hinted,(*x*) when a man takes upon himself the custody of goods *in consequence and consideration of another gainful contract;* and, though an innholder be not paid in *money* for securing the traveller's trunk, yet the guest facit ut faciat, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this reasoning, the custody of the goods may be con-

(*x*) Pages 49, 50.

sidered as *accessary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light Gaius, and as great a man as he, Lord Holt, seem to view the obligation; for, they agree, "that, although a bargeman and a master of a ship receive their fare for the passage of travellers, and an innkeeper his pay for the accommodation and entertainment of them, but have no pecuniary reward for the *mere custody* of the goods belonging to the passengers or guests, yet they are obliged to take *ordinary* care of those goods; as a fuller and a mender are paid for their *skill only*, yet are answerable, *ex locato*, for *ordinary neglect*, if the clothes be lost or damaged."(*y*)

In whatever point of view we consider this bailment, no more is *regularly* demanded of the bailee than the care which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it* by *any person whatever*;(*z*)(50) nor

(*y*) D. 4. 9. 5. and 12 Mod. 487.
(*z*) Year B. 10 Hen. VII. 26. 2 Cro. 189.

(50) This proposition is laid down rather too extensively; for an innkeeper will not be responsible, if the guest be robbed by his own servant, or companion, or any one whom he desires to be lodged with him; for in these cases, the loss is rather attributable to the guest, than to any fault on the part of the innkeeper. (Calye's Case, 8 Rep. 33. Noy's Maxims, Bythewood's ed. 213. Edwards' Case, Cro. Eliz. 285. Burgess *v.* Clements, 4 M. and S. 311.)

The liability of an innkeeper, as defined by a writ of trespass in the Registrum Brevium, fo. 105. Fitz. N. B. 94. against an innkeeper, for the loss of the goods of his guest, which is the foundation of the common law upon this subject, and upon which Calye's case, 8 Rep. 32. is a commentary, is not so extensive as that of a common carrier; yet upon principles of public policy is greater

shall he discharge himself from this responsibility by a refusal to take any care of the goods *because there*

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than what, according to the principle contained in this essay, would be exacted from him by reason of his reward. According to the terms of that writ, an innkeeper, who keeps a common inn for the entertainment of travellers, is bound to take care of the goods and chattels of his guest, which are within his inn, without loss or damage, so that no injury arises by any means through the default of him, or his servants. (Vide Beedle *v.* Morris, Cro. Jac. 224. Cross *v.* Andrews, Cro. Eliz. 622. Noy's Maxims, Bythewood's Ed. 213. 1 Com. Dig. 298. 1 Roll. Abr. 2. (D.) 1. 4.)

An inn may be defined to be a house kept open publicly, for the lodging and entertainment of travellers and others, paying a reasonable compensation for the accommodation which is professed to be given. (Calye's case, 8 Rep. 32. Parkhurst *v.* Foster, Carth. 417. Thompson *v.* Lacy, 3 Barn. and Ald. 285. Bac. Abr. Inns and Innkeepers, C.) It is said if a man puts a sign at his door, and harbours guests, that shall be deemed a common inn, and the owner chargeable as an innkeeper: and that if, after taking down the sign, he continues to entertain travellers, it shall be deemed a common inn, as if he had a sign. (2 Roll. Rep. 344, 5.) A sign is not essential to an inn, but is evidence of it. (Per Holt, C. J. in Parker *v.* Flint, 12 Mod. 255.) But a person who lived at Epsom, and lodged strangers in the season for drinking the waters, and dressed victuals for them, and sold beer to his lodgers, and to none else, and found hay for their horses, is not an innkeeper, nor can his house be considered as an inn. (Parkhurst *v.* Foster, Carth 417. 5 Mod. 427. 1 Salk. 387. S. C.)

A house of public entertainment in London, in this case, a tavern and coffee-house, where lodging and entertainment are provided for travellers and others indiscriminately, but which are not frequented by stage-coaches and wagons, and had no stables belonging to it, was considered as an inn, and the owner subject to the liabilities of an innkeeper, even where the guest did not appear to have been a traveller, but one who had previously resided in ready furnished lodgings. (Thompson *v.* Lacy, 3 Barn. and Ald. 285.)

In a case where a question arose whether a coffee-house came within the description of an inn in a policy of insurance against fire, enumerating the trade of an innkeeper with others as doubly hazardous, Lord Ellenborough, C. J. observed, "I think a coffee-house is not an inn, within the meaning of the policy. Horses, wagons, and coaches come to an inn, there are stables and outhouses attached to it, people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered doubly hazardous. But the trade of a coffee-house keeper is of a very different description." (Doe, ex dem. Pitt, *v.* Laming, 4 Camp. 77.)

Common inns, according to the commentary in Calye's case, 8 Rep. 32., were instituted for passengers and wayfaring men, for the latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a via*, and therefore if a neighbour who is not a traveller, at the request of the innkeeper,

are suspected persons in the house for whose conduct he cannot be answerable:(a) it is otherwise, indeed, if he

(a) Mo. 78.

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lodges there as a friend, and his goods are stolen, he shall not have an action. (Vide 1 Roll. Abr. 3. (E.) pl. 4.) So if a man hires a chamber for a term, or sojourns in an inn upon a special agreement. (Latch. 127. Moore, 887. Per Holt, C. J. in Parker *v.* Flint, 12 Mod. 254.) or if a person be a guest, but deliver the goods to an innkeeper upon another account. (1 Roll. Abr. 3 (E.) pl. 1.) the innkeeper is not chargeable. But a person who continues for a week or more; or goes out, and says that he will return at night, (Drope *v.* Thaire, 1 Latch. 127. Moore, 887. Gelley *v.* Clark, Cro. Jac. 189.) or if, during a temporary absence, he leaves goods, as a horse, from which the owner may derive a profit on account of their keep, (Gelley *v.* Clark, Cro. Jac. 189. Buller, N. P. 72. Bridgman's ed. York *v.* Grindstone, 1 Salk. 388. 2 L. Ray. 866. S. C.) such person will be entitled to be considered as a guest. But if the goods are such as the innkeeper can derive no benefit from on account of their keep, a guest will not continue to be such after he has quitted the inn, Gelley *v.* Clark, supra. So if a servant come into an inn and ask to leave his master's goods till the next market day, and the inkeeper refuses, because his house is full of parcels, and the servant sit down and drink as a guest, and put the goods behind him, and they are lost, the innkeeper is liable to the master. (Bennet *v.* Mellor, 5 T. R. 273.)

An innkeeper is bound to receive a guest, having room for him, and if he refuse, without a reasonable ground for his refusal, or on a false pretence that his house is full, he will be liable to an action. (Dyer, 158. b. 1 Roll. Abr. 3. (F.) pl. 1. 2 Roll. Rep. 345. Carth. 418. 1 Hawk. P. C. 225. 52. Per Buller and Grose, Js. in Bennett *v.* Mellor, 5 T. R. 274.) But an innkeeper does not absolutely engage to receive every person who comes to his house, but only those who are capable of paying a compensation suitable to the accommodation provided. (Per Abbot, C. J. and Bailey, J. in Thompson *v.* Lacy, 3 Barn. and Ald. 285.)

An innkeeper is also bound to take care of the goods of his guest being within his inn, although the guest neither delivers them to the innkeeper, nor acquaints him with them. (Calye's case, 8 Rep. 33. Noy's Maxims, 92. Bythewood's ed. 213.) In the case of Quinton *v.* Courtney, Hayw. North Car. Rep. 41. a traveller who had saddle bags, in which were two hundred dollars, upon alighting at the inn, delivered the bags to a servant of the tavern-keeper, but did not inform either the servant or tavern-keeper that money was in the bags. These bags were placed in the bar-room, and were afterwards found on the lot, cut open, and the money gone, it was held that the innkeeper was liable. So in the case of Clute *v.* Wiggins, (14 Johns. Rep. 175,) it was decided that to make the innkeeper liable it was not necessary that the goods should be delivered into his special keeping; nor to prove negligence. But if the trust was not reposed in the innkeeper, but in another person, who was not in the capacity of a

refuse admission to a traveller because he really has no room for him, and the traveller, nevertheless, in-

servant, but occasionally in the business of the family, the case is taken out of the general rule, and the innkeeper is not liable. (Sneider *v.* Geiss, 1 Yeates' Rep. 34.) If an innkeeper refuse to receive a guest because his house is really full, and yet the party says he will shift for himself, if he be robbed, the innkeeper is discharged. (White's case, Dyer, 158. b. Doct. and Stu. 238, 239. F. N. B. 94. 95. Dyer, 266.) This liability extends to all goods, by the loss of which damage may arise to the guest, as deeds, bonds, or other specialties, but does not extend to any personal injury to the guest; but only to his moveables. (Calye's case, 8 Rep. 33. 2 Roll. 58. Dyer, 5. pl. 2. Yelv. 68.) But they must be within the inn at the time of the loss, for if the horse of the guest be put out to pasture at his own desire, and it is then stolen, the innkeeper will not be responsible; but if he do it without the guests order, he will remain liable. (Calye's case, 8 Rep. 32. Noy's Maxims, 93. Bythewood's ed. 213.) So if the guest leaves the goods in an outer court, in consequence of which they are stolen, the innkeeper is not responsible. (Noy's Maxims, 93. Bythewood's ed. 213.

A traveller for orders who put up at the defendant's inn, had appropriated to him, at his own desire, a private room which opened into a gateway leading to the street, for the purpose of showing his goods to his customers. After dining in the traveller's room, where upon his arrival he had been conducted, and his goods placed, he removed to the private room, and while displaying his goods, which consisted chiefly of articles of jewellery, he was twice interrupted by a stranger. There was a key to the door, which he was told he might have, but upon his leaving the inn he did not lock the door, nor did he know that he even shut it, and upon his return in the evening, two of his boxes were missing. In an action against the innkeeper for the loss of the goods, a verdict was found in his favour, which was afterwards sanctioned by the court, upon the ground, that the room was not assigned to the traveller merely as a guest, but for a purpose for which the innkeeper was not bound to provide it, and which led to the introduction of persons over whom he had no controul, and that after the interruption of the stranger, it became the duty of the traveller to use ordinary care for the preservation of his goods, and that it was owing to his neglect, and not to the fault of the innkeper, that the loss had happened. (Burgess *v.* Clements, 4 M. & S. 306.)

From this obligation the innkeeper cannot discharge himself, and defeat the provisions of the law by any act of his own, as by putting his guest's horse out to pasture without his consent. (Calye's case, sup.) So, "it is no excuse for an innkeeper to say that he delivered the key of the chamber-door to his guest, in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guests in safety." (22 H. VI. 21. 11 H. IV. 45. 42 Ed. III. 11. Calye's case, 8 Rep. 33.) But if there is evidence that he accepted the key, and took upon himself the care of his goods, it will be for a jury to determine whether this evidence of his receiving the key proves that he

sist upon entering, and place his baggage in a chamber without the keeper's consent.(*b*)

(*b*) Dy. 158. b. 1 And. 29.

did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room. (Burgess *v.* Clements, 4 M. and S. 310.) Nor can he discharge himself by a plea that he was sick, and of non-sane memory, at the time the guest lodged with him, for an innkeeper must at his peril keep safely his guest's goods; and if he be sick, his servant then ought carefully to look to them. (Cross *v.* Andrews, Cro. Eliz. 622.) The liability of the innkeeper extends only to losses which arise from his want of care, or that of his servants, and not to an injury committed by the king's enemies. (Plow. Com. 9. 1.) Nor to any damage arising from the default of the guest. (Calye's case, 8 Rep. 23. Noy's Maxims, Bythewood's ed. 213.) And therefore, if an innkeeper requires his guest to lock up his goods in such a chamber, or he will not warrant their safety, and the guest suffers them to lie open in an outer court, the host is not liable if they are stolen. (Sanders *v.* Spencer, Dyer, 266. l. Noy's Maxims, Bythewood's ed. 213.)

The keeper of an hotel is not liable to pay for the washing of the linen of the guests at his house. (Callard *v.* White, 1 Stark. N. P. C. 171.)

An innkeeper, like a common carrier, is entitled to a right of lien upon the goods of the guest, and may detain them for what is due to him for the lodging and entertainment provided for the guest, until the debt is paid. (York *v.* Grindstone, 1 Salk. 388. Thompson *v.* Lacy, 3 B. and A. 285.) Nor can the guest defeat this right by directing that the horse shall not have any more food, but he shall pay for it afterwards, otherwise the innkeeper shall lose the horse, which is his security. (Per Holt, C. J. Skinner, 648.) But on the other hand, the innkeeper cannot sell the goods detained, for, like a distress at common law, the detention is only to insure the payment due to the innkeeper. (2 Roll. Abr. 85. A. pl. 5. Bulst. 207. Bac. Abr. tit. Inns.) He has no power, therefore, to sell his guest's horse when he has eaten his value, but such right may exist, by special custom, as in London and Exeter. (2 Roll. Abr. 85. (A.) pl. 6 Moor, 876. Baldway *v.* Ouston, 1 Vent. 71.) In trover against an innkeeper, for the sale of horses belonging to his guests, to indemnify him for their keep, which exceeded their value, it was holden on demurrer, that an innkeeper has no power to sell horses, except within the City of London, and that when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again. (Jones *v.* Pearle, 1 Str. 556.)

The remedies against an innkeeper for the loss or injury of goods are similar to those against a common carrier. A master may maintain an action in his own name for property stolen from his servant, while a guest at the defendant's inn. (Beedle *v.* Morris, Cro. Jac. 224. Drope *v.* Thaire, Latch. 127. Robinson *v.* Walter, 1 Roll. Abrid. 3. l. 40. Bennett *v.* Mellor, 5

Add to this, that, if he fail to provide honest *servants* and honest *inmates*, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests who sleep in his chambers.(*c*) Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great
[96] principle of public utility, to which all private considerations ought to yield; for, travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while

(*c*) 1 Bl. Comm. 430.

T. R. 273.) But it appears that if a person take another's horse to an inn, without the owner's consent, where it is stolen, the owner cannot maintain an action against the innkeeper, for he was not his guest. (1 Roll. Abr. 3. l. 32. See 1 Com. Dig. 297. Yelv. 162.) In an action against an innkeeper for property stolen out of his inn, the declarations must allege that he kept a common inn. Saunders *v.* Spencer, Dyer, 266: C. but the custom of the realm need not be set out, and if it is, a mis-recital will not prejudice the case. (Latch. 127. 2 Chitty on Pleading, 322. n. *e.*)

In an action of trover against an innkeeper for a horse detained for his keep, a denial is not evidence of a conversion, unless the plaintiff tender what the horse has eaten out, and it is a question for the jury to determine whether sufficient were tendered. (Anon. 2 Show. 161. Buller's Nisi Prius, Bridgeman's ed. 72.)

To sustain this action, the plaintiff must prove all the material allegations in his declaration, as, in addition to proof of the loss of the goods, that the defendant kept a common inn, and that he, his son, or servant, was a guest at the time, and that the goods were brought within the inn, and remained under the care of the defendant. (Buller N. P. 72. Bridgeman's ed.) But it is not necessary to prove negligence on the part of the innkeeper. Per Buller, J. in Bennett *v.* Mellor, 5 T. R. 276. The loss of the goods being *primâ facie* evidence of negligence on his part, which it is incumbent upon him to repel by showing that the loss was not occasioned by his fault, or that of his servants. See p. 96. [Vid. Story's Comm. 310 et seq.]

the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to Pomponius, *his desire of securing the public from the dishonesty of such men*, and by his edict gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali*, or by *inevitable accident;* and Ulpian intimates that even this severity could not restrain them from knavish practices or suspicious neglect.(*d*)

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by proving that he took *ordinary* care, or that the *force* which occasioned the loss or damage was truly *irresistible*.

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention:* it may be called *locatio custodiæ*, and might have been made a distinct branch [97] of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care* which he *lets out* for pay are in truth a mental *operation*. Whatever be his appellation, either in English or Latin, he is clearly responsible, like other interested bailees, for *ordinary* negligence;(51) and,

(*d*) D. 4. 9. 1. and 3.

(51) A warehouseman, or depositary of goods for hire, is responsible only for ordinary negligence, and consequently is not liable for a loss arising from accident, where he is in no default. (Roberts *v.* Turner, 12 Johns. R. 232. Platt *v.* Hibbard, 7 Cowen R. 497. Brown *v.* Denison, 2 Wend. R. 593.)

A common carrier, from Stourpoint to Manchester, undertook to carry goods

Remarks on St. German.

although St. German seems to make no difference in this respect between *a keeper of goods for hire* and *a simple depositary*, yet he uses the word *default*, like the *culpa* of the Romans, as a generical term, and

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from the former to the latter place, and to forward them from thence to Stockport. Upon his arrival at Manchester, the goods were deposited in his warehouse to await an opportunity of sending them forward by the Stockport carrier, there being none there at that time, to whom goods sent from Stourpoint to go beyond Manchester were immediately delivered, on payment of the price of the carriage from Stourpoint to Manchester. No distinct price was charged for the goods while they were in the warehouse at Manchester, nor would they be deposited there, if the Stockport carrier was ready to receive them upon their arrival at that place. The goods, while they remained in the warehouse, and before they could be forwarded in the usual way, were destroyed by an accidental fire. The carrier was holden not to be liable for the loss, for his duty as a carrier having terminated, the depositing the goods in his warehouse invested him only with the character of a warehouseman, and in that capacity he was not responsible for an injury arising from no want of negligence on his part. (Garside *v.* The Proprietors of the Trent and Mersey Navigation, 4 T. R. 581. Vide Hyde *v.* The Trent and Mersey Navigation Company, 5 T. R. 389. Roskell v. Waterhouse, 2 Stark. N. P. C. 462.) So where a quantity of ginseng, deposited in the defendant's warehouse, was destroyed by rats, notwithstanding the defendant took the precaution to shut the lid of the box every night, after it had been opened during the day by the owner, for the purpose of showing it to purchasers, and adopted reasonable precautions to destroy vermin, he was holden not liable for the damage, since the responsibility of a warehouseman was not similar to that of a common carrier, and that he had exerted all due and common diligence for the preservation of the commodity. (Califf *v.* Danvers, Peake, N. P. C. 114. See Finucane *v.* Small, 1 Esp. N. P. C. 315.) The liability of a warehouseman commences the instant the goods are placed in his hands, and, in the case of goods delivered by a carman, attaches from the time the crane is applied to raise them into the warehouse. From that moment he becomes liable for any loss or injury they may sustain by means of his default, and it is no defence that they were injured by falling into the street from the breaking of the tackle, the carman who brought the goods having refused the offer of slings which was made for further security. (Thomas *v.* Day, 4 Esp. N. P. C. 262.) In an action against a depositary of goods for hire, positive evidence of negligence must be given; for mere proof of the loss of the goods is not sufficient to put the defendant on his defence. (Finucane *v.* Small, 1 N. P. C. 316.)

In respect to wharfingers, their case is not distinguishable from that of other depositaries for hire, and they are therefore responsible only for ordinary diligence. The *dicta* to the contrary are examined and refuted by Judge Story, Comm. p. 293.

leaves the *degree* of it to be ascertained by the rules of law.(*e*)

In a sentence immediately following, he makes a very material distinction between the two contracts; for, "if a man," says he, "have *a certain recompence* for the keeping of goods, and promise at the time of the delivery *to redeliver them safe at his peril*, then he shall be charged with *all chances* that may befal; but, if he make *that* promise, and *have nothing* for keeping them, he is bound to *no casualties* but such as are wilful, and happen *by his own default*:" now the word [98] *peril*, like periculum, from which it is derived, is in itself ambiguous, and sometimes denotes the *risk* of *inevitable mischance*, sometimes the *danger* arising from *a want of due circumspection*; and *the stronger sense* of the word *was taken* in the first case *against him who uttered it*; but in the second, where the construction is favourable, the *milder* sense was justly preferred.(*f*) Thus, when a person, who, if he were wholly *uninterested*, would be a *mandatary*, undertakes for a *reward* to perform *any work*, he must be considered as bound still more strongly *to use a degree of diligence adequate to the performance of it*: his obligation must be rigorously construed, and he would, perhaps, be answerable for *slight* neglect, where no more could be required of a *mandatary* than *ordinary* exertions. This is the case of commissioners, factors, and bailiffs,(52) when their undertaking *lies in fesance*,

Law concerning factors and traders.

(*e*) Doct. and Stud. where before cited. (*f*) See before, p. 45.

(52) This opinion is inconsistent with the general principles of this class of bailments. In bailments of mutual benefit, the bailee is liable only for ordinary, and not for slight neglect; for ordinary neglect of skill, and not for slight. The

and not simply in *custody;* hence, as a peculiar care is demanded in removing and raising a fine column of granite or porphyry, without injuring the shaft or the capital, Gaius seems to exact *more than ordinary* diligence from the undertaker of such a work for a stipulated compensation.(*g*) Lord Coke considers a factor in the light of a *servant*, and thence deduces his obligation; but, with great submission, his *reward* is the true reason, and *the nature of the business* is the just measure of his duty;(*h*) which cannot, however,
[99] extend to a responsibility for *mere accident* or *open robbery;*(*i*) and even in the case of *theft*, a factor has been holden excused when he showed "that he had *laid up* the goods of his principal in a warehouse, out of which they were *stolen* by certain malefactors to him unknown."(*k*)

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for *a due application of the necessary art:* it is his own fault if he undertake a work above his strength; and all that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor operis faciendi.*(*l*) I conceive, however, that,

(*g*) D. 19. 2. 7. (*h*) 4 Rep. 84. Ld. Raym. 918.
(*i*) 1 Inst. 89. a. (*k*) 1 Vent. 121. Vere and Smith.
(*l*) Spondet, say the Roman lawyers, peritiam artis.

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workman for hire undertakes for the ordinary diligence of a workman in his particular business; and the very case put of commissioners, (commission merchants,) factors and bailiffs, when their undertaking lies in fesance, shows the mistake: for, it is clear, that only ordinary diligence and skill can be demanded of them. (Russell *v.* Palmer, 2 Wils. R. 325. Denew *v.* Daverell, 3 Camp. N. P. C. 451. Sheills *v.* Blackburne, 1 H. Bl. 159. Seare *v.* Prentice, 8 East R. 348. Story, 283.)

where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability.(*m*) The case which Sadi relates with elegance and humour in his Gulistan, or Rose-garden, and which Puffendorf cites with approbation,(*n*) is not in- [100] applicable to the present subject, and may serve as a specimen of Mahomedan *law*, which is not so different from ours as we are taught to imagine: 'A man who had a disorder in his eyes, called on a *farrier* for a remedy; and he applied to them a medicine commonly used for *his* patients: the man lost his sight, and brought an action for damages;' but the judge said, "No action lies, for, if the complainant had not himself been an *ass*, he would never have employed a *farrier*;" and Sadi proceeds to intimate, that, "if a person will employ a common *mat-maker* to weave or embroider *a fine carpet*, he must impute the bad workmanship to his own folly."(*o*)

Mahomedan law.

In regard to the distinction before mentioned between the *non*-fesance and the *mis*-fesance of a workman,(*p*) it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages, whenever the work was undertaken for a *reward*, either actually

(*m*) Page 54. (*n*) De Jure Nat. et Gent. lib. 5, c. 5, s. 3.

(*o*) Rosar. Polit. c. 7. There are numberless tracts in Arabic, Persian, and Turkish, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own; nor would it be less easy to explain in Persian or Arabic such parts of our English law, as either coincide with that of the Asiatics, or are manifestly preferable to it.

(*p*) Pages 54, &c.

paid, *expressly* stipulated, or, in the case of a *common* trader, strongly *implied;* of which Blackstone gives
[101] the following instance: "If a *builder* promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it, Caius has an action on the case against the builder for this breach of his express promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay."(*q*) The learned author meaned, I presume, a *common* builder, or supposed a *consideration* to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the *non*-performance of a *mandatary*.(*r*)

Rules and distinctions.

Before we leave this article, it seems proper to remark, that every bailee for *pay*, whether conductor rei or conductor operis, must be supposed to know that the goods and chattels of his bailor are in *many* cases *distrainable* for rent, if the landlord, who might otherwise be shamefully defrauded, find them on the premises;(*s*) and, as they cannot be distrained and sold without his *ordinary* default *at least*, the owner has a remedy over against him, and must receive a compensation for his loss:(*t*) even if a *depositary* were to remove and conceal *his own* goods, and those of his depositor were to be seized for rent-arrere, he
[102] would unquestionably be bound to make restitution; but there is no obligation in the bailee to *suggest wise precautions against inevitable accident;* and he cannot, therefore be obliged *to advise insurance from fire;* much less *to insure* the things bailed without an authority from the bailor.

(*q*) 3 Comm. 157.
(*r*) Pages 56, 57, 61.
(*s*) Burr. 1498, &c.
(*t*) 3 Bl. Comm. 8.

It may be right also to mention, that the distinction before taken in regard to *loans*,(*u*) between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing*: in the first case, it is a regular *bailment;* in the second, it becomes a *debt*. Thus, according to Alfenus, in his famous law, on which the judicious Bynkershoek has learnedly commented, "if an ingot of silver be delivered to a silversmith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape:"(*w*) the smith may consequently apply it to his own use: but, if it perish even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed to be *specifically* delivered in the form of a cup or a standish.(53)

Celebrated law of Alfenus.

[103]

3. Locatio operis *mercium vehendarum* is a contract which admits of many varieties in *form*, but of none,

Hiring of *carriage*.

(*u*) Pages 64, 65. (*w*) D. 19. 2. 31. Bynk. Obs. Jur. Rom. lib. VIII.

(53) Vid. Buffum *v.* Merry, 3 Mason R. 478. But where wheat was delivered at a mill to be ground, upon an agreement that the miller should return to the farmer a given quantity of flour for so many bushels of wheat; the miller was held a bailee and not a purchaser, and consequently not responsible for an accidental loss by fire; and this although it was understood between the parties that the miller was not bound to return the product of the identical wheat delivered, but an equal amount of a certain quality. (Slaughter *v.* Green, 1 Rand. Rep. 3. Seymour *v.* Brown, 19 Johns. R. 44. But see Hurd *v.* West, 7 Cow. R. 752, 756, n. Ewing *v.* French, 1 Black. Ind. Rep. 353, cont.

as it seems *at length* to be settled, in the *substantial* obligations of the bailee.(54)

A *carrier for hire* ought, by the rule, to be responsible only for *ordinary* neglect; and, in the time of Henry VIII., it appears to have been generally holden, "that a *common* carrier was chargeable, in case of a loss by *robbery*, only when he had travelled by *ways dangerous for robbing*, or driven by *night*, or at any *inconvenient hour*:"(*x*) but, in the commercial reign of Elizabeth, it was resolved, upon the same broad principles of policy and convenience that have been mentioned in the case of *innholders*, "that, if a *common carrier* be *robbed* of the goods delivered to him, he shall answer for the value of them."(*y*)

Now, the *reward* or *hire*, which is considered by Sir Edward Coke as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of *ordinary* care, but cannot extend to *irresistible force*; and, though some other bailees have a *recom-*
[104] *pense*, as, *factors* and *workmen for pay*, yet, even in Woodliefe's case, the Chief Justice admitted that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier*: the true ground of that resolution is the *public employment* exercised by the carrier, and the danger of his combining with *robbers*, to the infinite injury of commerce and extreme inconvenience of society.(*z*)

(*x*) Doct. and Stud. where often before cited.
(*y*) 1 Inst. 89, a. Mo. 462. 1 Ro. Abr. 2, Woodliefe and Curties.
(*z*) Ld. Raym. 907. 12 Mod. 487.

(54) For a statement of the law relating to carriage for hire, see Appendix, article Common Carriers.

The modern rule concerning a *common* carrier, is that nothing will excuse him, except *the act of* God, or of "*the king's enemies;*"(*a*)(55) but a momentary attention to the principles must convince us that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it: a carrier is *regularly* answerable for neglect, but not *regularly* for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence or unavoidable *misfortune;* but the great maxims of policy and good government make it it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between carriers and desperate villains, with little or no chance of detection.(56) Exceptions from the general rule.

Although the *act of* God, which the ancients, too, called θεοῦ βίαν and vim divinam, be an expression which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place *inevitable accident:* religion and reason, which can never be at variance without certain injury to one of them, assure us that "not a gust of wind blows, nor a flash of lightning gleams, without the knowledge and guidance of a superintending mind;" but this doctrine loses its dignity and sublimity by a technical application of it, which may in some instances border even upon pro- [105]

(*a*) Law of Nisi Prius, 70, 71.

(55) Besides these common law exceptions, there are statutory limitations on the responsibility of carriers, which are stated in the Appendix.

(56) For an exposition of the principles of the carrier's responsibility, see Riley *v.* Horne, 2 Moore and Payne, 333, 5 Bing. 217—the judgment of Best, C. J.

faneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, "that the ship was tight when the goods were placed on board, but that a rat, by knawing out the oakum, had made a small hole, through which the water had gushed;"(*b*) but the true reason of this decision is not mentioned by the reporter; it was, in fact, *at least ordinary* negligence, to let a rat do such mischief in the vessel;(57) and the Roman law has, on this principle, decided, that "si fullo vestimenta polienda acceperit, eaque *mures roserint*, ex locato tenetur, quia *debuit ab hac re cavere*.(*c*)

Whatever doubt there may be among civilians and common lawyers in regard to a *casket the contents of which are concealed from the depositary*,(*d*) it seems to
[106] be generally understood that a *common carrier* is answerable for the loss of a box or parcel, be he ever so *ignorant of its contents*,(58) or be those contents ever so valuable, *unless* he make a *special* acceptance:(*e*) but *gross fraud and imposition* by the bailor will de-

(*b*) 1 Wils. part 1, 281. Dale and Hall.
(*c*) D. 19. 2. 13. 6.
(*d*) Before, pp. 37, 38, 39.
(*e*) 1 Stra. 145. Tichburn and White.

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(57) But if the master had used all reasonable precautions to prevent such a loss, as by having a cat on board, by the general consent of the writers upon the foreign maritime law, it would be held a peril of the sea, or inevitable accident. (Abbott on Shipp. p. 3, c. 3, s. 9. Roccus de Navibus, n. 56. Id. De Assecur. n. 49. 1 Emerig. Assecur. 277, 378. Marsh. Ins. B, 1, c. 7, s. 4, p. 242. Garrigues *v.* Coxe, 1 Binn. R. 592; but see 3 Kent. Comm. 243, and n. (*c*.) Aymer *v.* Astor, 6 Cowen R. 266.)

(58) By a recent English statute, carriers by land are relieved from their common law liability, in the cases of certain descriptions of property, unless its nature and value be declared by the bailor at the time of its delivery to the carrier. See Appendix.

prive him of his action; and, if there be proof that the parties were apprised of each other's intentions, although there was no personal communication, the bailee may be considered as a *special* acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in Ventris, Alleyne, and Carthew, are examined with liberality and wisdom; but, in all of them, too great stress is laid on the *reward*, and too little on the important motives of *public utility*, which alone distinguish *a carrier* from other *bailees for hire*.(*f*) Though no substantial difference is assignable between carriage by *land* and carriage by *water*, or in other words, between a *wagon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of James I., that a *common hoyman* like a common *wagoner*, is responsible for goods committed to his custody, even if he be *robbed* of them;(*g*) but the reason said to have been given for this judgment, namely because *he had his hire*, is not the true one; since, as we have before suggested, the *recompense* could only make him liable for *temerity* and *imprudence*; as, if a bargemaster were rashly to shoot a bridge, *when the bent of the weather is tempestuous*; but not for a *mere casualty*, as, if a hoy, in good condition, shooting a bridge *at a proper time*, were driven against a pier by a sudden breeze, and overset by the violence of the shock;(*h*) nor, by parity of reason, for any other force too great to be resist-

Law concerning masters of vessels.

[107]

(*f*) Burr. 2208. Gibbon and Paynton. See 1 Vent. 238. All. 93. Carth. 485.

(*g*) Heb. ca. 30. 2 Cro. 330. Rich and Kneeland. "The first case of this kind," said Lord Holt, "to be found in our books." 12 Mod. 410.

(*h*) 1 Stra. 128. Amies and Stevens.

ed;(i) the *public* employment of the *hoyman*, and that *distrust* which an ancient writer justly calls the *sinew of wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.

All that has just been advanced concerning a *land* carrier may, therefore, be applied to a *bargemaster* or *boatman*; but, in case of a tempest, it may sometimes happen that the law of *jetson* and *average* may occasion a difference. Barcroft's case, as it is cited by
[108] Chief Justice Rolle, has some appearance of hardship: "a box of jewels had been delivered to a ferryman, who knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea; yet it was resolved *that he should answer for it*:"(k) now, I cannot help suspecting that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough to have been kept longer on board than other goods; for, in the case of the Gravesend barge, cited on the bench by Lord Coke, it appears that the pack which was thrown overboard in a tempest, and for which the bargeman was holden *not answerable*, was of great value *and great weight*; although this last circumstance be omitted by Rolle, who says only, that the master of the vessel had *no information of its contents*.(l)(59)

(i) Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* most learnedly discussed in Desid. Heraldi. Animadv. in Salmasii Observ. in Jus. Att. et Rom. cap. xv.

(k) All. 93. (l) 2 Bulstr. 280. 2 Ro. Abr. 567.

(59) Judge Story remarks, (Comm. 339,) that if the doctrine of Barcroft's case be, that jettison will not in a clear case of necessity discharge the carrier, it is not law. (Vid. Smith v. Wright, 1 Caines' Rep. 43.)

The subtilty of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a *barge*-master, there was no reason to be equally rigorous in regard to the master of a *ship:* who, if he carry goods for *profit*, must indubitably answer for the *ordinary neglect* of himself or his mariners, but ought not, they said, to be chargeable for the violence of *robbers:* it was, however, otherwise decided in the [109] great case of Mors and Slew, where "eleven persons armed came on board the ship *in the river*, under pretence of *impressing seamen*, and forcibly took the chests which the defendant had engaged to carry;" and, though the master was entirely blameless, yet Sir Mathew Hale and his brethren, having heard both civilians and common lawyers, and, among them, Mr. Holt for the plaintiff, determined, on the principles just before established, that the bailor ought to recover.(*m*) This case was frequently mentioned afterwards by Lord Holt, who said, that "the declaration was drawn by the greatest pleader in England of his time."(*n*)

Still further: since neither the *element* on which the goods are carried, nor the *magnitude* and *form* of the carriage make any difference in the responsibility of the bailee, one would hardly have conceived that a diversity could have been taken between a *letter* and any other thing. Our *common* law, indeed, was acquainted with no such diversity; and a *private* postmaster was precisely in the situation of another carrier; but the statute of Charles II. having established a *general* post-office, and taken away the liberty of

(*m*) 1 Ventr. 190, 238. Raym. 220. (*n*) Ld. Raym. 920.

[110] Case of Lane and Cotton.

sending letters by a *private* post,(o) it was thought that an alteration was made in the obligation of the post-master *general:* and in the case of Lane and Cotton, three judges determined, against the fixed and well-supported opinion of Chief Justice Holt, "that the post-master was *not* answerable for the loss of a letter with exchequer bills in it;"(p)(60) now this was a case of *ordinary* neglect, for, the bills were *stolen* out of the plaintiff's letter *in the defendant's office;*(q) and, as the master has a great *salary* for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, professedly enacted for *safety* as well as *dispatch*, could not have been intended to deprive the subject of any benefit which he before enjoyed; for these reasons, and for many others, I believe that Cicero would have said what he wrote on a similar occasion to Trebati-

(o) 12 Cha. II. c. 35. See the subsequent statutes.

(p) Carth. 487. 12 Mod. 482.

(q) In addition to the authorities before cited, p. 44, n. (o,) for the distinction between a loss by *stealth* and by *robbery*, see Dumoulin, tract De eo quod interest, n. 184, and Rosella casuum, 28. b. This last is the book which St. German improperly calls Summa Rosella, and by misquoting which he misled me in the passage concerning *the fall of a house*, p. 68. The words of the author, Trovamala, are these: "Domus tua *minabatur ruinam:* domus corruit, et interficit equum tibi *commodatum;* certe non potest dici casus fortuitus; quia *diligentissimus* reparasset domum, vel ibi non habitasset; si autem domus non minabatur ruinam sed *impetu tempestatis* valide corruit, non est tibi imputandum."

(60) (1 Ld. Raym. 646, S. C.) The same question was again discussed in Whitfield v. Lord Le Despencer, (Cowp. 754), and the court were of the same opinion. But, although the postmaster general is not liable as a common carrier, for the negligence of his deputies or servants, they are personally liable for all losses and injuries occasioned by their own default in office. (Renning v. Goodchild, 3 Wils. R. 443. Whitfield v. Lord Le Despencer, Cowp. 754. Stork v. Harris, 5 Burr. 2709. Vid. Dunlap v. Munroe, 7 Cranch. 242, 269.)

us, "Ego tamen *Scævolæ* assentior."(*r*) It would, perhaps, have been different *under the statute*, if the post had been *robbed* either by day or by *night*, when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my essay with observing, in the plain but emphatical language of St. German, "that all the *former* diversities be granted by secondary conclusions derived upon the law of reason, *without any statute made in that behalf*: and, peradventure, laws and the conclusions therein be the more plain and the more open; for, *if any statute were made therein*, I think verily more doubt and questions would arise *upon the statute*, than doth now, when they be only argued and judged after the *common* law."(*s*)

Before I finish the *historical* part of my essay, in which I undertook to demonstrate "that a perfect harmony subsisted on this interesting branch of jurisprudence in the codes of nations *most eminent for legal wisdom*,"(*t*) I cannot forbear adding a few remarks on the institutions of those nations who are generally called *barbarous*, and who seem in many instances to have deserved that epithet: although traces of sound reasoning and solid judgment appear in most of their ordinances. Laws of the Northern nations. [112]

By the ancient laws of the Wisigoths, which are indeed rather obscure, the "keeper of a horse or an ox for *hire*, as well as a *hirer for use*, was obliged, if the animal *perished*, to return another of equal worth:" the law of the Baiuvarians on this head is nearly in the same words; and the rule is adopted with little

(*r*) Epist. ad Fam. VII. 22.
(*s*) Doct. and Stud. dial. 2, chap. 38, last sentence.
(*t*) Page 11.

alteration in the capitularies of Charlemagne and Lewis the Pious,(*u*) where the Mosaic law before cited, concerning a *borrower* may also be found.(*w*) In all these codes a *depositary* of gold, silver, or valuable trinkets, is made chargeable, if they are destroyed by *fire*, and *his own* goods perish *not* with them; a circumstance which some other legislators have considered as *conclusive* evidence of gross neglect or fraud: thus, by the old British Tract, called the Book of Cynawg, a person who had been *robbed* of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, *unless he had saved his own goods*: and it was the same, I believe, among the Britons in the sake of a loss by *fire*, which happened without the fault of the bailee; although Howel the Good seems to have been rigorous in this case for the sake of public security.(*x*) There was one regulation in the Northern code, which I have not seen in that of any other nation; if precious things were deposited and *stolen*, time was given to search for the thief, and, if he could not be found, within the time limited, a *moiety* of the value was to be paid by the depositary to the owner, 'ut damnum ex medio uterque sustineret."(*y*)

Laws of the Britons.

[113]

Now, I can scarce persuade myself, that the phrase used in those laws, si id perierit, extends to a perishing by *inevitable accident*: nor can I think that the old Gothic law cited by Stiernhook fully proves his

(*u*) Lindenbrog. LL. Wisigoth. lib. 5, tit. 5, ss. 1, 2, 3, and LL. Biauvar. tit. 14, ss. 1, 2, 3, 4. Capitul. lib. 5, s. 204.

(*w*) Capitul. lib. 6, s. 22. Exod. xxii. 14, 15.

(*x*) LL. Hywel Dda. lib. 3, c. 4, s. 22, and lib. 3, c. 3, s. 40. See also Stiernh. De Jur. Sueon. p. 256, 257.

(*y*) LL. Wisigoth. lib. 5, tit. 5, s. 3.

assertion, that "a depositary was responsible for *irresistible force*;" but I observe that the military lawgivers of the North, who entertained very high notions of good faith and honour, were more strict than the Romans in the duties by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states and those of a people who could suffer disputes concerning bailments to be decided by *combat*: for, it was the Emperor Frederick II. who abolished the [114] trial by battle in cases of contested deposits, and substituted a more rational mode of proof.(z.)

Laws of the Indians.

I purposely reserved to the last the mention of the Hindu, or Indian, code, which the learning and industry of my much-esteemed friend, Mr. Halhed, has made accessible to Europeans, and the Persian translation of which I have have had the pleasure of seeing; these laws, which must *in all times* be a singular object of curiosity, are *now* of infinite importance; since the happiness of millions, whom a series of amazing events has subjected to a British power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of those conclusions which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not fettered and manacled by *positive* institution; and, although the rules of the Pundits concerning *succession* to *property*, the *punishment* of *offences*, and the *ceremonies* of *religion*, are widely different from ours, yet, in the great system of *contracts* and the common intercourse between man and man, the Pootee of the Indians and

(z) LL. Longobard. lib. 2, tit. 55, s. 35. Constit. Neapol. lib. 2, tit. 34.

the Digest of the Romans are by no means dissimilar.(*a*)

Thus, it is ordained by the sages of Hindustan,
[115] that a depositor shall carefully inquire into the character of his intended depositary; who, if he undertake to keep the goods, shall preserve them with *care* and *attention*, but shall not be bound to restore the value of them, if they be *spoiled by unforeseen accident*, or *burned*, or *stolen; unless* he *conceal* any part of them that has been saved, or unless *his own effects be secured*, or unless the accident happen after his *refusal* to redeliver the goods on a demand made by the depositor, or while the depositary, against the nature of the trust, presumes to *make use* of them: in other words, "the bailee is made answerable for *fraud*, or for *such negligence* as approaches to it."(*b*)

So, a *borrower* is declared to be chargeable even for *casualty* or *violence*, if he fail to return the thing after the completion of the business for which he borrowed it; but not if it be *accidentally* lost or *forcibly* seized, *before* the expiration of the time, or the conclusion of the affair, for which it was lent:(*c*) in another place it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall never-
[116] theless recover his debt with interest, but the debtor shall not be entitled to the value of his pawn;(*d*) and that, if the pledgee *use* the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage whilst he uses it.(*e*)

(*a*) "Hæc omnia," says Grotius, "Romanis quidem congruunt legibus, sed non ex illis primitus, sed ex æquitate naturali, veniunt: quare eadem apud alias quoque gentes reperire est." De Jure Belli ac Pacis, lib. 2, cap. 12, § 13.
(*b*) Gentoo Laws, ch. 4. See before, p. 47. (*c*) Ibid. See before, p. 68.
(*d*) Chap. 1, § 1. Before p. 84, 85. (*e*) Chap. 1, § 2. Before, p. 81.

In the same manner, if a person *hire* a thing *for use*, or if any *metal* be delivered to a *workman* for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by *natural* misfortune or the injustice of the *ruling power*, *unless* it be kept *after the time* limited for the return of the goods or the performance of the work.(*f*)

All these provisions are consonant to the principles established in this essay; and I cannot help thinking that a clear and concise treatise, written in the Persian or Arabian language, on the law of *contracts*, and evincing the general conformity between the Asiatic and European systems, would contribute, as much as any regulation whatever, to bring our English law into good odour among those whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

Thus have I proved, agreeably to my undertaking, [117] that *the plain elements of natural law* on the subject of *bailments*, *which have been traced by a short analysis*, are recognised and confirmed by the wisdom of nations;(*g*) and I hasten to the third or *synthetical* part of my work, in which, from the nature of it, most of the *definitions* and *rules* already given must be repeated, with little variation in *form*, and none in *substance:* it was at first my design to subjoin, with a few alterations, the Synopsis of Delrio; but, finding that, as Bynkershoek expresses himself, with an honest pride, *I had leisure sometimes to write, but never to copy;* and, thinking it unjust to embellish any production of mine with the inventions of another, I changed

(*f*) Ch. 4 and ch. 10. Before, p. 88, 91. (*g*) Before, p. 4 and 11.

III. The Synthesis.

my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method which logicians call *Synthesis*, and in which all sciences ought to to be explained.

Definitions.

I. To begin then with *definitions:* 1. *Bailment is a delivery of goods in trust, on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed.*

2. *Deposit* is a *bailment* of goods, *to be kept for the bailor without a recompense.*

3. *Mandate* is a *bailment* of goods, *without reward,* to be *carried from place to place,* or *to have some act performed about them.*

[118] 4. *Lending for use* is a *bailment* of *a thing* for a certain time *to be used* by the borrower *without paying for it.*

5. *Pledging* is a *bailment* of goods by a debtor to his creditor *to be kept till the debt be discharged.*

6. *Letting to hire* is, 1. a *bailment* of *a thing to be used* by the hirer *for a compensation in money;* or, 2. a *letting out* of *work* and *labour* to be *done,* or *care* and *attention* to be *bestowed,* by the bailee, *on the goods bailed,* and that for *a pecuniary recompense;* or, 3. of *care* and *pains* in *carrying the things delivered from one place to another for a stipulated or implied reward.*

7. *Innominate bailments* are those where the *compensation* for the *use* of a thing, or for *labour* and *attention,* is *not pecuniary;* but either, 1. the *reciprocal use,* or the *gift* of some *other* thing; or, 2. *work* and *pains, reciprocally* undertaken; or, 3. the *use* or *gift* of ano-

ther thing in consideration of *care* and *labour*, and conversely.

8. *Ordinary neglect* is the *omission* of that *care* which *every man of common prudence and capable of governing a family*, takes of *his own* concerns.

9. *Gross neglect* is the *want* of that *care* which *every man of common sense, how inattentive soever*, takes of *his own* property.

10. *Slight neglect* is the *omission* of that *diligence* which *very circumspect and thoughtful persons* use in securing *their own* goods and chattels. [119]

11. A *naked contract* is a contract made without *consideration* or *recompense*.

II. The *rules* which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these: Rules.

1. A bailee who derives *no benefit* from his undertaking, is responsible only for *gross* neglect.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for *slight* neglect.

3. When the bailment is *beneficial* to *both* parties, the bailee must answer for *ordinary* neglect.

4. A *special agreement* of any bailee to answer for *more* or *less*, is in general valid.

5. *All* bailees are answerable for actual *fraud*, even *though the contrary be stipulated.*

6. No bailee shall be charged for a loss by *inevitable accident* or *irresistible force*, except by *special agreement.*

7. *Robbery* by *force* is considered as *irresistible;* but a loss by *private stealth* is *presumptive* evidence of *ordinary* neglect.

8. *Gross* neglect is *a violation of good faith.*

9. *No action* lies to compel performance of a *naked contract.*

10. A reparation may be obtained by suit for every *damage* occasioned by an *injury.*

[120] 11. The negligence of a *servant*, acting *by his master's express or implied order*, is the negligence of the *master.*

Propositions.

III. From these *rules* the following *propositions* are evidently deducible.

1. A *depositary* is responsible only for *gross* neglect: or, in other words, for *a violation of good faith.*

2. A *depositary*, whose character is known to his depositor, shall not answer for *mere neglect*, if he take *no better care of his own goods*, and *they also* be spoiled or destroyed.

3. A *mandatary to carry* is responsible only for *gross* neglect, or *a breach of good faith.*

4. A *mandatary to perform a work* is bound to use *a degree of diligence adequate to the performance of it.*

5. A man cannot be compelled by *action* to perform his promise of engaging in a *deposit* or a *mandate.*

6. A reparation may be obtained by suit for *damage* occasioned by the *non-performance* of a promise to become a *depositary* or *mandatary.*

7. A *borrower for use* is responsible for *slight* negligence.

8. A *pawnee* is answerable for *ordinary* neglect.

9. The *hirer* of a *thing* is answerable for *ordinary* neglect.

10. A *workman* for *hire* must answer for *ordinary* neglect of the goods bailed, and apply a *degree of skill equal to his undertaking.*

11. A *letter* to *hire* of his *care* and *attention* is responsible for *ordinary* negligence.

12. A *carrier* for *hire*, by *land* or by *water*, is answerable for *ordinary* neglect.

IV. To these *rules* and *propositions* there are some *exceptions:*

Exceptions.

1. A man who *spontaneously* and *officiously* engages to *keep* or to *carry* the goods of another, though *without reward*, must answer for *slight* neglect.

2. If a man, through *strong persuasion* and with *reluctance*, undertake the execution of a *mandate*, no more can be required of him than a *fair exertion of his ability.*

3. *All* bailees become responsible for losses by *casualty* or *violence after* their *refusal* to return the things bailed on a *lawful demand.*

4. A *borrower* and a *hirer* are answerable in *all events* if they *keep* the things borrowed or hired *after the stipulated time*, or *use* them *differently* from their agreement.

5. A *depositary* and a *pawnee* are answerable in *all events*, if they *use* the things deposited or pawned.

6. An *innkeeper* is chargeable for the goods of his guest *within his inn*, if the guest be *robbed* by the *servants* or *inmates* of the keeper.

7. A *common carrier* by *land* or by *water* must indemnify the owner of the goods carried, if he be *robbed* of them.

General corollary and remark.

V. It is no exception, but a *corollary*, from the *rules*, that "every bailee is responsible for a loss by *accident* or *force*, however *inevitable* or *irresistible*, if it be *occasioned* by that *degree of negligence* for which the nature of his contract makes him generally answerable;" and I may here conclude my discussion of this important title in jurisprudence with a general and obvious *remark;* that "*all* the preceding rules and propositions may be diversified to *infinity* by the *circumstances* of every particular case;" on which circumstances it is on the Continent the province of a *judge* appointed by the sovereign, and in England, to our constant honour and happiness, of a *jury* freely chosen by the parties, *finally* to decide: thus, when a painted *cartoon*, pasted on canvass, had been *deposited*, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question "whether the depositary had been guilty of *gross* neglect," was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refused to grant a new trial;(*h*) but it was the judge who determined that the defendant was by *law* responsible
[123] for *gross* negligence only; and if it had been proved that the bailee had kept *his own* pictures *of the same sort* in the same place and manner, and that *they too* had been spoiled, a new trial would, I conceive, have been granted; and so, if no more than *slight* neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide, against law, that a bailee *without reward* was responsible for it.

Conclusion.

Should the *method* used in this little tract be approved, I may possibly not want inclination, if I do not

(*h*) 2 Stra. 1099. Mytton and Cock.

want leisure, to discuss in the same form *every* branch of English law, *civil* and *criminal*, *private* and *public*; after which it will be easy to separate and mould into distinct works, the three principal divisions; or the *analytical*, the *historical*, and the *synthetical* parts.

The great system of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility: if *law be* a *science*, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but, if it be *merely* an [124] unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and he will become the greatest lawyer who has the strongest habitual or artificial *memory*. In practice, *law* certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory*, in transmitting to us the reason of sage and learned men, to which our own ought invariably to yield, if not from a becoming modesty, at least from a just attention to that object for which all laws are framed and all societies instituted, *the good of mankind*.

APPENDIX.

OF CARRIAGE FOR HIRE.

In the examination of this extensive and important species of bailment, it is proposed to consider, first, who are those persons who may be considered as common carriers, or who, not being such, nevertheless render themselves liable to similar duties by their private engagements; secondly, the duties of a common carrier; and thirdly, his rights. As, however, the effects of a bailment of this nature is very frequently to introduce another party, who is entitled to demand a delivery of the goods, and to insist upon a compensation for the loss or damage they may sustain in the course of their conveyance, it is proposed to consider, fourthly, the effect of a delivery of goods to a carrier on behalf of a purchaser, as between the consignor and the consignee, and the right of the consignor to stop them in transitu; and in the last place will be considered, the remedies which may be adopted against the carrier for a breach of his engagements, and the evidence required on those occasions.

Description of common carriers.

Persons who come within the description of common carriers, are all persons who carry goods generally for hire. But no special agreement for a reward is requisite to bring a person within this description; for, since he is entitled by law to a reasonable reward, he is as much liable as if there were a special agreement for a sum certain. (Bastard *v.* Bastard, 2 Show. 81. Rogers *v.* Head, Cro. Jac. 222. Harris *v.* Packwood, 3 Taunt. 272. McClure *v.* Hammond, 1 Bay, Rep. 99. Harrington *v.* Tyles, 2 Nott & McC. 88.) Within this class of persons are included the proprietors of stage-wagons, and of stage-coaches, who carry goods as well as passengers for hire, the master and owner of ships, hoymen, lightermen, barge-owners, ferrymen, and wharfingers. (Morsé *v.* Slue, 1 Mod. 85. Allen *v.* Sewall, 2 Wend. R. 327. 340.) But a person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owner of the goods, but has no concern in the vessels by which they are forwarded, or interest in the freight, is not a common carrier. (Roberts *v.* Turner, 12 Johns. Rep. 232.)

Proprietors of stage wagons.

The proprietors of stage-wagons have at all times been considered as common carriers, and appear to be peculiarly the object of the law in this respect. If a wagoner by whom goods are sent to be delivered to A. sell them openly in a street of a city to B. the sale vests no property in the purchaser. (Lecky *v.* McDermott, 8 Serg. and Rawle, 500. See cases, infra.) So where a person who brought goods to London, on his private account, and on his return in the country took such goods as he could obtain; the

court decided, that any man undertaking for hire to carry goods of all persons indifferently, was so far a common carrier, as to protect the goods from a distress. (Gisbourne v. Hurst, 1 Salk. 249.)

Proprietors of stage-coaches.

The proprietors of stage-coaches, in the conveyance of passengers, are not liable for the same responsibility which is imposed upon them in the carriage of goods; and if their employment extended only to the former service, they would not be considered as common carriers. (Christie *v.* Griggs, 2 Camp. 79. White *v.* Boulton, Peake N. P. C. 80. Aston *v.* Heaven, 2 Esp. N. P. C. 533.) If, however, they carry goods as well as passengers for hire, they will come within that description; and accordingly, in an action for the loss of a passenger's luggage, it was decided, that if a coachman commonly carry goods, and take money for so doing, he will be in the same case with a common carrier, and is a carrier for that purpose, whether the goods belong to a passenger or a stranger. (Per Jones, J. in Lovett *v.* Hobbs, 2 Show. 128.) A distinct charge for the goods as well as for the passenger was formerly deemed to be necessary; and in an action against the master of a stage-coach, for the loss of a trunk belonging to the plaintiff, (a passenger,) which was delivered to the driver, and stolen in the course of the journey, it was holden that this action did not lie against the master, and that a stage-coachman was not within the custom as a carrier is, unless such as take a distinct price for the carriage of goods as well as persons, as wagons with coaches. (Per Holt, C. J. in Middleton *v.* Fowler, Salk. 282.) So a hackney coachman was holden not to be a common carrier

within the custom of the realm, and could not be charged for the loss of passenger's goods, except where there was a special agreement and money paid for the carriage of the goods. (Per Holt, C. J. in Upshare *v.* Aidee, Com. R. 25.) But since it may reasonably be presumed, that the care of the luggage is an inducement for the passenger to take his place, and that the coachmaster, like an innkeeper, includes in the fare his charge for such responsibility, the same principles of public policy which invest him with the character and responsibility of a common carrier, when he charges a distinct price for the carriage of goods, would appear to require a similar rule when no such charge is made, but the goods are received as accompanying the passenger. The point does not appear to have been judicially decided in any modern reported case; but Mr. Justice Chambre, in delivering his opinion in the case of Robinson *v.* Dunmore, (2 Bos. & Pul. 419.) observed, that it had been decided, that if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. So, in an action for the value of a passenger's trunk, which was stolen in the course of the journey, and for the carriage of which no distinct charge appears to have been made; the defendant insisted that he was not responsible for the loss, inasmuch as he was exempted by a general notice not to be liable for parcels above the value of 5*l.*, unless entered as such and paid for accordingly: the plaintiff's counsel insisted that the notice applied only to goods sent to be carried, and not to the case

of a passenger's luggage. But Lord Ellenborough observed, that the luggage of passengers came within the exception. (Clark *v.* Gray, 4 Esp. 177. 6 East, 564. S. C.) The practice of carrying for hire in a stage-coach parcels not belonging to passengers constitutes the proprietors of the coach common carriers, and they will be held liable for the loss of such a parcel by the driver, who was one of the proprietors. (Dwight et al. *v.* Brewster, 1 Pick. Rep. 50.)

Masters of vessels.

The master of a vessel also comes within the description of a common carrier, for he is rather in the nature of a confidential officer than a servant, although he is paid by the owners. In the case of Morse *v.* Slue, (2 Lev. 69. 1 Vent. 190. 228. Sir Thomas Raymond, 220,) which was an action brought against the master of a vessel for the loss of goods which happened without his default, it was objected that the action should have been brought against the owners of the vessel, and not against the master, who was no more than a servant to them at a certain salary; but the court decided that he was responsible as master, and that the case was not different from a common hoyman, a common carrier, or innkeeper. (See Abbott on Shipping, 234. 4th ed.)

Masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port, within the state, or beyond sea, at home or abroad, and they are answerable, as well by the *marine law* as by the common law of England, for all losses not arising from inevitable accident, or such as could not be foreseen or prevented. (Elliot & Stewart *v.* Rossell & Lewis, 10 Johns. Rep. 1. Clark and others *v.*

Richards, 1 Conn. Rep. 54. Williams *v.* Grant, id. 487. Emery *v.* Henry, 4 Greenl. Rep. 407. 5 Day Rep. 415. But see Bell *v.* Reed, 4 Binn. R. 127. Gordon *v.* Little, 8 Serg. & R. 583. Aymar *v.* Astor, 6 Cowen R. 266.)

Owners of vessels.

The owners of a vessel are also common carriers, equally with a carrier by land, and are liable, in respect of the freight, for goods spoiled by default of the master; but they must be charged on the custom of the realm, or as usually carrying goods for hire. (Boucher *v.* Lawson, Ca. temp. Hard. 194. Boson *v.* Sandford, Salk. 440. 3 Lev. 258. 1 Show. 29. 2 Show. 478. Skin. 278. 3 Mod. 321. Carth. 58. S. C. See Abbot on Shipping, 231. 4th ed.) As a shipmaster or keelman who carries goods from port to port. (Dale *v.* Hall, 1 Wils. 281.) So a hoyman, by the custom of the realm, is a common carrier. (1 Roll. Abr. 2. c. 2. pl. 2. See Wardell *v.* Mourillyan, 2 Esp. N. P. C. 693.) So an action lies equally against a common bargeman without any special agreement, as against a common carrier. (Rich v. Kneeland, Cro. Jac. 330. Hob. 18.) And in the same manner it lies against a ferryman. (1 McCord, 157. 439. 2 Nott & McCord, 19.)

Where the master of a vessel received several hogsheads of gin on board, to transport from Hartford to Boston, at customary freight, which was stowed on deck, and ejected during the voyage by reason of tempestuous weather, it was held that the owners were liable for the loss, unless such stowage was authorized by the consent of the shipper, or by custom. (Barber *v.* Brace, 3 Conn. Rep. 9. Smith *v.* Wright, 1 Caines' R. 43.)

It is sufficient to subject the owner for the acts of the master, that the latter is in fact master with the privity of the owner, without any special appointment. (Clark et al. *v.* Richards, 1 Conn. Rep. 54.)

Wharfingers. So, wharfingers are equally common carriers, between whom and other carriers no distinction can be made. (Ross *v.* Johnson, 5 Burr. 2825.) And in an action for the loss of goods accidentally destroyed by fire, while upon the defendant's premises, who were wharfingers, and whose duty it was to convey the goods from the wharf in their lighter to the vessel in the river, Lord Ellenborough, C. J. was of opinion, upon an objection being made as to their responsibility for the loss, that the liability of a wharfinger, whilst he has possession of the goods, was similar to that of a carrier. (Maving *v.* Todd, 1 N. P. C. 72. See Cobban *v.* Downe, 5 Esp. N. P. C. 41.)

Carrier's servants. A common carrier is responsible for the acts of his servant or agent whom he employs in the execution of the duty which belongs to him; and no contract will be implied between the owner of the goods and the person whom the carrier may employ for that purpose; until it is performed, his character of a common carrier continues. (See Cavenagh *v.* Such, 1 Price, 328.) And the driver of a stage-coach, to whom a parcel is delivered, will be presumed to receive it on his master's account; and the mere previous delivery of several parcels by the driver, for which there appears no contract for the payment of a reward, will not be sufficient to render him a common carrier, so as to make him responsible for the loss of a parcel intrusted to him upon the same terms. A habit of carrying goods for hire, or some contract

indicating that the servant acted as a common carrier, and not in his ostensible capacity of a servant, is necessary to make him a carrier. (Williams *v.* Cranston, 2 Stark, N. P. C. 82.)

Officers belonging to the post office.

In the conveyance of letters by the post established by the government for the public convenience, and under the guidance of its own officers, regulated by various acts of parliament, the persons concerned in that employment are not considered as common carriers, although they are personally responsible for their individual neglect. In an action, therefore, against the Postmaster-General, for the loss of exchequer bills taken out of a letter delivered into the office, the court decided, contrary to the opinion of Holt, C. J., who delivered an elaborate judgment to the contrary, that the action was not maintainable. (Lane *v.* Cotton, 1 Lord Raym. 646. 1 Salk. 17.) So, upon the same principles, an action was holden not to lie against the Postmaster-General, for a bank-note stolen by one of the sorters out of a letter delivered into the post-office. (Whitfield *v.* Lord Le Despenser, 2 Cowp. 754. See supra 109, 110, & n. 60.)

Private persons.

A private person, who undertakes the carriage of goods, will be responsible for their safe conveyance, according to the terms of his agreement, though not as a common carrier. The chief distinctions which exist between these different persons, appear to be, that the former is not obliged, like a common carrier, to undertake the carriage of goods, and is responsible only to the extent of his contract, and not for that additional degree of responsibility which is required from a common carrier. (See Coggs *v.* Bernard, 2 Lord Raym. 909. Hutton *v.* Osborne, Selwyn's Nisi

Prius, 382. n. 7. 4th ed. Robinson *v.* Dunmore, 2 Bos. & Pul. 417. Satterlee *v.* Groat, 1 Wend. R. 272.) Thus, a person who had undertaken the *carriage* of goods, and warranted that they should go safe, was holden to be liable, not as a common carrier, but upon his special undertaking. (Robinson *v.* Dunmore, 2 Bos. & Pul. 417.) So an action lies against the commander of a ship of war, who takes the bullion of a private merchant on board, for not safely keeping and delivering it. (Hodgson *v.* Fullarton, 4 Taunt. 787.)

An agreement will not be implied on the part of a servant at an inn, in order to render him responsible for goods left there for delivery by a carrier, nor will the division of the profits arising from the porterage of goods, adopted as a mode of remuneration, vary his character; and, in the case of a porter of an inn, who had charge of all parcels brought to the coach-office, and whose duty it was to deliver them to the persons to whom they were directed, and for which he received half of the porterage, it was holden, that he was not personally liable for the loss of a parcel delivered to him by the guard of a mail-coach, which stopped at the inn, but a mere servant to the proprietor, and, as such, not responsible. (Cavenagh *v.* Such, 1 Price, 328. Vide Hyde *v.* the Trent and Mersey Navigation Co. 5. T. R. 397.) The degree of care required of a private person who undertakes the carriage of goods for a reward, is regulated by the general rule in the text, and extends only to a responsibility for ordinary negligence. But this may be increased or diminished by particular stipulations. As where the defendant, having undertaken the convey-

ance of some furniture, and warranted that it should go safe, was holden responsible for damage sustained by rain in the course of the journey, and that he was not discharged from his liability by the owner sending a porter with him for the purpose of watching and taking care of the goods. (Robinson *v.* Dunmore, 2 Bos. & Pul. 417.)

Obligations to receive.

By the general custom of the realm, that is, by the common law, (1 Roll. Abr. 2 C. pl. 1. 2 Bl. Comm. 67. Rushforth *v.* Hadfield, 6 East, 525.) a common carrier is bound to carry the goods of the subject for a reasonable reward; and if he refuse to do so, having convenience, and being tendered satisfaction for the carriage, he will be liable to an action, unless he has reasonable ground for his refusal. (Jackson *v.* Rogers, 2 Show. 129. 1 Show. 104, 105. Morse *v.* Slue, 1 Vent. 238. Bull. N. P. 70. Per Holroyd, J. in Batson *v.* Donovan, 4 B. & A. 32. 1 Wms's. Saund. 312. n. 2.)

If a coachman refuse to take charge of goods, because his coach is full, and the goods are nevertheless put on the coach, without the coachman's knowledge, who, as soon as he perceives it, refuses to take charge of them, he will not be responsible for their loss. (Lovett *v.* Hobbs, 2 Show, 128.) So a refusal would be considered reasonable, where it appeared, that it was a time of public commotion, and that the goods which the carrier was desired to carry, were the object of popular fury, and would be attended with a risk, against which his precaution would be inadequate to secure him. (Edwards *v.* Sherratt, 1 East, 604.) So, it would be a reasonable excuse for not carrying goods of great value, either if it appeared

that the carrier did not hold himself out as a person ready to carry all sorts of goods, or that he had no convenient means of conveying such articles with security. (Per Holroyd, J. in Batson *v.* Donovan, 4 Barn. & Ald. 32.)

Nature of Delivery.

To render a carrier responsible for goods, there must be a delivery to him, or his servant, or some person acting on his behalf, so as to charge him with their custody, for otherwise there can be no inception of the contract. And, therefore, when goods were left at an inn yard, where the defendant and several other carriers put up, but without proving any delivery to him or his servant, this was holden not to be sufficient to charge the defendant with their custody. (Selway *v.* Holloway, 1 Lord Raym. 46. See Buller's Nisi Prius, 36. Bridgman's ed. James *v.* Jones, 3 Esp. N. P. C. 27. Hawkins *v.* Rutt, Peake's N. P. C. 186.) So, where a quantity of goods were left at a wharf, piled up among other goods, with a direction to the consignee, but no receipt was taken, nor were the goods booked, or any person belonging to the wharf fixed with a privity of their being left there, the carrier was holden not to be charged with such a delivery as would render him responsible to the buyer, in the event of a loss. (Buckman *v.* Levi, 3 Camp. 414.)

A delivery to the mate of a vessel by a wharfinger, in the usual course of trade, will discharge him of his responsibility; for by that means the mate is charged with the care of the goods, and will be liable, although they may be lost while on the wharf. (Cobban. *v.* Downe, 5 Esp. N. P. C. 41.)

The delivery to a carrier may be complete, so as to

charge the carrier, although not sufficient to charge the purchaser, for in this latter case the delivery must be such as to give the consignee a right of action against the carrier, in the event of the loss of the goods. (Buckman *v.* Levi. 3 Camp. 414. See 1 Stark. N. P. C. 17.) If, therefore, goods are delivered to a carrier, without specially entering them as required by a general notice, which is known to the consignor, and the goods are lost, the buyer is not liable for their value. In this case the seller has an implied authority; and it is his duty to do whatever is necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to put them in such a course of conveyance, as that, in case of a loss, the buyer might have his indemnity against the carrier. (Per Lord Ellenborough, in Clarke *v.* Hutchins, 14 East, 475.) But the necessity of complying with the terms of the notice may be dispensed with by the purchaser, as where goods have been previously sent without being entered and insured as above the limited sum, and no objection made up on that account. (Cothay *v.* Tute, 3 Camp. 129.)

The goods must also be packed properly, and in fit condition for their journey at the time they are delivered to the carrier, for, otherwise, if any loss arise on that account during their conveyance, the carrier will not be responsible. (See Beck *v.* Evans, 16 East, 245. Stuart *v.* Crawley, 2 Stark. 324.) Where, however, there was a complete delivery, acknowledged by a receipt of a greyhound, which afterwards escaped, and was lost, the carrier was not allowed to set up as a defence, that the dog was not properly secured, when delivered to him, for, after the

delivery, he became responsible for the animal, and was bound to lock him up, or take other means to secure him. (Stuart *v.* Crawley, 2 Stark. N. P. C. 323.)

Where a common carrier pays damages for the loss of goods by negligence or unskilful management, it is tantamount to a safe delivery, and he is entitled to freight. (Hammond *v.* M'Clure, 1 Bay, Rep. 101.)

Nature of the contract.

A person delivering goods to a carrier is not bound, by the common law, to specify their quality or value, for it is the duty of the carrier to make inquiry, if he desires to secure himself against particular hazard, or to receive a larger premium. (Titchburne *v.* White, 1 Str. 145. Per Holroyd, J. in Batson *v.* Donovan, 4 B. & A. 31.) An acceptance of goods generally will, therefore, render him responsible, whatever may be their value, and notwithstanding he is ignorant of that circumstance. But if a parcel is received upon condition that there is no money in it, the carrier will not be liable if the parcel is lost, and did in truth contain money. (Titchburne *v.* White, 1 Stra. 145.) So, where two bags, sealed up, were delivered to the carrier, and said to contain 200*l.*; for which sum the carrier gave a receipt, when in fact it contained 400*l.*, Holt, C. J. decided, that the carrier was responsible only for 200*l.*, because there was a particular undertaking for the carriage of that sum; and that the reward, which was the measure of his responsibility, did not extend further. (Tyly *v.* Morrice, Carth. 485. See 4 Burr. 2301.) In the same manner, where the plaintiff delivered to the defendant, a carrier, a box, telling him

only, "that there was a book and tobacco in the box," whereas, in fact, it contained 100*l.*, Roll, C. J. was of opinion, that as the carrier had not made a special acceptance, he was answerable; but, with respect to the intended cheat upon the carrier, he told the jury they might consider him in damages, but they, notwithstanding, gave a verdict for 97*l.* against the carrier. "Quod," observes the reporter, "durum videbatur circumstantibus." (Kenrig *v.* Eggleston, Aleyn. 93.) So, where one brought a box, in which there was a large sum of money, to a carrier, who demanded of the owner what was in it; he answered, it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed; and resolved that he was liable. But, if the carrier had told the owner, that it was a dangerous time, and, if there was money in it he durst not take charge of it, and the owner had answered as before, this matter would have excused the carrier. (Morse *v.* Slue, 1 Vent. 238.) And Lord Mansfield, C. J. in Gibbon *v.* Paynton, (4 Burr. 2301.) commenting on the two preceding cases, observed, that in the first case he should have agreed in opinion, *cum circumstantibus*, and that, in the second, he should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for the money, for it was artfully concealed from him, that there was any money in the box. The delivery, indeed, must be free from artifice or misrepresentation, made with a view to deceive the carrier; for honesty and good faith are as requisite in this, as in every other contract, and, consequently, any concealment or fraudulent device in the delivery of goods, will discharge

the carrier. (See Gibbon *v.* Paynton, 4 Burr. 2298. Batson *v.* Donovan, 4 B. & A. 21.) And where the carrier has given notice, that he will not be liable for parcels of value, unless they are entered, and a proportionate premium paid, this will be equivalent to a special acceptance, and render it incumbent upon the owner to disclose the value, in order to make the carrier responsible. The effect of the notice will be, when no special entry is made, to entitle the carrier to consider the parcel as of an ordinary nature, and not falling within that description of goods for which he refuses to be liable without a compliance with the terms of the notice; and in such cases, the holding out, as an ordinary risk, what is, in truth, an extraordinary one, will be considered as a legal fraud. And the legal maxim applies, "Ex dolo malo non oritur actio." (Per Bailey, J. in Batson *v.* Donovan, 4 Barn. & Ald. 37.) In the before mentioned case of Gibbon *v.* Paynton, the carrier, who was protected by a general notice, received a quantity of gold, packed in an old nail-bag, which was stuffed with hay, to give it a mean appearance. The court considered this mode of packing so valuable an article as a fraud, and, on that ground, gave judgment for the defendant. (See Buller's Nisi Prius, 71 a. Bridgman's ed. Batson *v.* Donovan, 4 Barn. & Ald. 31.) So, in the last mentioned case of Batson *v.* Donovan, where no concealment or actual fraud was practised on the carrier: he had however given notice within the plaintiff's knowledge, that he would not be accountable for bills, bank-notes, &c. unless notice was given, and an additional premium paid; but the plaintiff, nevertheless, delivered to him the banker's parcel, contain-

ing articles of that description to a large amount, without disclosing the nature or value of its contents, and the parcel was subsequently lost; the court held, that the plaintiff, having knowledge of the notice, was bound to have informed the carrier of the value, in order to render him responsible. And Mr. Justice Bailey observed, that the holding out as an ordinary risk, what is really an extraordinary one, is a legal fraud." (4 Barn & Ald. 37.) So, where there is a general notice not to be responsible for articles of a particular description, and goods of that nature are delivered to a carrier, whether he is to receive a reward or not, the nature and value of the parcel should be communicated, to enable him to adopt proper precautions for their safety. (Bignold *v.* Waterhouse, 1 Maule & Selw. 261.)

But directing a banker's parcel, containing bank-notes and bills to a large amount, to their clerk, in order to conceal the nature of its contents, and without giving the carrier any notice of its value, will not be deemed fraudulent, so as to deprive the owner of his remedy for a loss, in a case where the carrier was deprived of the benefit of his notice by misfeasance. (Sleat *v.* Fagg. 5 B. & A. 343.)

In the case of a partnership, the acts of each partner in the name of the firm, and for partnership purposes are binding upon all the partners; but the transaction must be *bona fide*, and free from fraud, and not carried on by one partner, for his individual benefit, behind the backs of his co-partners. For, where an agreement was entered into with a banker by one partner, for his sole benefit, without the knowledge of his co-partners, to take the banker's private par-

cels free of expense, and, in pursuance of his arrangement, banking parcels had been sent for two years; in an action for the value of a parcel containing bills and notes to a considerable value, which was received in the usual way, and subsequently lost, the court held, that the other partners were not liable. (Bignold *v.* Waterhouse, 1 M. & S. 255.)

Obligations to carry safely.

The responsibility required of a carrier with reference to the care of goods of which he is entrusted with the carriage, rests upon two foundations; the particular nature of his contract, and the obligations superadded by law upon principles of public policy. A carrier, like every other bailee, may stipulate to sustain any degree of risk, or perform services however burthensome, and he will be bound to perform, to the extent of his contract, the engagements into which he has entered. But where no specific agreement is entered into, the acceptance of a reward would render him responsible only for ordinary negligence. As this degree of responsibility, however, would not be sufficient to protect the public interest from the fraud of a class of persons who are not entitled to extraordinary confidence, and are exposed to great temptations to be fraudulent with little chance of discovery, the common law, to prevent collusion between carriers and robbers, considerably enlarged their liability, even in some cases beyond what those principles would appear to warrant. (See 1 T. R. 32.) By the custom of the realm a carrier is responsible for events which are independent of his contract, and is liable for all losses, whether arising from accident, robbery, irresistible force, or any other means whatever, except they arise from the act of

God, or of the King's enemies. "By the nature of his contract, as observed by Lord Mansfield, C. J. in Forward *v.* Pittard, (1 T. R. 33,) a carrier is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an *insurer*. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man; as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz. that he ought to have sufficient force to repel it; but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." (See Proprietors of Trent Navigation *v.* Wood, 3 Esp. N. P. C. 231. Abbott on Shipping, 231, 4th ed. Dale *v.* Hall, 1 Wils. 281. Story Comm. 330.) But it will be no excuse for a carrier that the loss arose from the act of God, or of the King's enemies, if it were occasioned by his negligence. As where the plaintiff put

goods on board the defendant's hoy, who was a common carrier: coming through a bridge, by a sudden gust of wind the hoy sunk, and the goods were spoiled. Pratt, C. J. held the defendant not answerable, the damage being occasioned by the act of God; for, though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind, varied the case. The plaintiff's counsel having offered some evidence, that if the hoy had been in better condition it would not have sunk. The Chief Justice said, that a carrier was not obliged to have a new carriage for every journey; it was sufficient, if he provided one which, without any extraordinary accident such as this was, would probably perform the journey. (Amies *v.* Stevens, 1 Str. 128.)

Where a vessel was beating up the Hudson, against a light and variable wind, and being near shore, and while changing her tack the wind suddenly failed, in consequence of which she ran aground and sunk. It was held that this sudden failure of the wind was the act of God, and excused the master, there being no negligence on his part. (Colt *v.* McMecken, 6 Johns. Rep. 160.)

If a loss happens, the onus probandi lies on the carrier to exempt him from the liability: and it is not enough for him to prove, where the goods are carried by water, that the navigation is attended with so much danger that a loss may happen notwithstanding the utmost endeavours of the watermen and crew to prevent it; that the person conducting the boat possesses competent skill and due diligence, and provided hands of sufficient strength and experience to assist

him. (Murphy *v.* Slaton. 3 Munf. Rep. 239. and see Bell *v.* Reed, 4 Bin. Rep. 127. 6 Johns. Rep. 160.)

But where the master of a skipper, who had undertaken to carry a parcel of cotton, his own vessel being full, with the concurrence of plaintiff's overseer has it put on board of another vessel, but gave a receipt himself; that vessel became stranded, and the cotton damaged, but the vessel being proven good and sufficiently manned, the carrier who undertook was held not liable for the loss. (Barnwell *v.* Hussy, 1 Cons. Rep. S. C. 114.)

Where goods are damaged on board of a vessel in the voyage, and alleged to be so through the default of the master, it is not absolutely necessary that the damaged goods should be sold in order to give a right of action; and far less, that both the damaged and the sound should be sold. The plaintiff, if he have a right to recover at all, may prove his damages in any other competent manner. (Shackleford *v.* Patrick, 1 Cons. Rep. S. C. 311.) Whether there be negligence or not is a question of fact for the jury to decide. (Elliott *v.* Rossell, 10 Johns. Rep. 1. Colt *v.* McMecken, 6 Johns. Rep. 160.)

Where the owners of a vessel undertook to carry goods for hire, from one port to another, and during the passage the river became obstructed with ice, it was held that they were liable as common carriers for the damage sustained. (Richards *v.* Gilbert, 5 Day Rep. 415.)

If the vessel of a common carrier strike on a rock not generally known, and the master did not actually know it, and if he conducted himself properly, and no

fault was imputable to him, he would not be liable: *Secus*, if the loss be imputable to negligence, as if the master be ignorant of the navigation of the river, and have no pilot on board. (Williams *v.* Grant, 1 Conn. Rep. 487.)

A carrier's vessel must be sea-worthy, or he must answer, although the loss does not proceed from unsea-worthiness. (Bell *v.* Reed, 4 Binn. Rep. 127.)

If goods are delivered to a carrier for the purpose of carriage, and he is robbed of them, he will be answerable for their value, because, having his hire, there is an implied undertaking for their safe delivery. (Woodliefe *v.* Curties, 1 Roll. Abr. 2. C. pl. 4. 1 Inst. 89, a.)

Where a master of a vessel employed in the transportation of goods between New York and Albany, carried some flour to New York, for the ordinary freight, and having sold it in New York for cash, was robbed of the money; it was held that the owners of the vessel were liable for the amount, though no compensation beyond the freight was allowed for the sale of the goods and bringing back the money; such being the duty of the master in the usual course of the employment, where no special instructions were given. (Kemp *v.* Coughtry, 11 Johns. Rep. 107.)

In the same manner, he is responsible for an injury resulting from irresistible force; for though the force be never so great, as if an irresistible number of persons should rob him, he is nevertheless chargeable. (Per Holt, C. J. in Coggs *v.* Bernard, 1 Lord Raym. 919.) So, the carrier is responsible for inevitable accident, as in the above case of Forward *v.* Pittard,

(1 T. R. 25.) where the goods were destroyed by an accidental fire, communicating to the booth in which the goods were deposited for a temporary purpose, in the course of the journey; and where it was expressly found that they were consumed without any negligence in the carrier, and that the fire was not occasioned by lightning. (See Hyde *v.* the Trent and Mersey Navigation Company, 5 T. R. 389.) So, where the Proprietors of the Trent Navigation Company undertook to carry goods from Hull to Gainsborough, and the vessel on board of which the goods were, sunk in the river Humber, by driving against an anchor in the river, and the goods were in consequence considerably damaged, the carrier was holden responsible for the loss, notwithstanding it was objected, that the accident was occasioned by the negligence of persons on board a barge in the river, in not having their buoy out, to mark the place where the anchor lay. The court observed, that there was a degree of negligence in the carrier, for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor; and even if there had not been any actual negligence on the part of the carrier, yet that negligence, in point of law, was sufficient without any other cause. (Proprietors of the Trent Navigation *v.* Wood, 3 Esp. N. P. C. 127. Vid. Story Comm. 336.)

From this responsibility the adoption of additional means to insure safety will not exonerate the carrier, where the goods are in his custody in that character. If, therefore, goods of great value are delivered to a common hoyman, and the owner afterwards delivers them to another person in the boat to keep safely, but

does not discharge the hoyman, and they are afterwards lost through negligence, an action lies against the hoyman. (Roll. Abr. 2. C. pl. 3.) So, if a man travel in a stage-coach and take his portmanteau with him; though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. (Per Chambre, J. in Robinson *v.* Dunmore, 2 Bos. & Pul. 419.)

The injury, however, must happen whilst the goods are in the carrier's custody as a common carrier, for where a carrier by water had reached the place of his destination, and the goods were deposited in a warehouse belonging to him, but without any distinct charge being made on that account, for the convenience of the owner, and until they could be forwarded by another conveyance; the carrier's duty, as such, was holden to have terminated, and that he was not liable for the loss of the goods, which arose from their being destroyed by an accidental fire while they were in the carrier's warehouse. (Garside *v.* the Trent and Mersey Navigation Company, 4 T. R. 581. See Platt *v.* Hibbard, 7 Cowen, 497. Ackley *v.* Kellogg, 8 Cowen, 223.) So, in an action by the East India Company against a lighterman on an undertaking to carry goods for hire, for not safely conveying them from a ship in the river Thames to the Company's warehouses, by which they were lost. It appeared that upon the unshipping of the goods the Company had, as was their custom, put an officer called a guardian on board the lighter, who, as soon as the lading was complete, put the Company's locks on the hatches, and accompanied the goods to see

them safely delivered. Raymond, C. J. was of opinion, that this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the Company's servant who had hired the lighter to use himself; he thought, therefore, that the action was not maintainable, and the plaintiffs were non suited. (East India Company *v.* Pullen, Str. 690.) In commenting upon this case, (in Robinson *v.* Dunmore, 2 Bos. & Pul. 419,) Chambre, J. observed, that this decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to the officer called the guardian.

But since it is the duty of a carrier to deliver goods at the houses of persons to whom they are directed, where it is the usage of his trade to do so, they will be considered in his custody as a common carrier, and he will, therefore, be liable as such, until they are so delivered. The defendants, who were common carriers from Gainsborough to Manchester, received a quantity of goods to be conveyed from the former place along their Navigation and the Duke of Bridgewater's canal to Manchester, where they were lodged in the Duke of Bridgewater's warehouse, and there consumed by an accidental fire the same night. Distinct charges were made for the carriage of the goods along different parts of the navigation; for warehouse room for the Duke of Bridgewater, which the defendants received as his agents, and without any share of the profit; and also for cartage from the Duke of Bridgewater's warehouse to the plaintiff's

warehouse at Manchester. The defendants had formerly delivered the goods in their own cart, but had latterly given up that business, and the profits to be derived from it, to their book-keeper, which was known to the plaintiffs. The goods having been lost, the defendants were holden liable, since they had received the goods in the capacity of carriers, and as their engagement was to carry and deliver them, the goods remained in their custody, as carriers, the whole time, which was not affected by the arrangement made by them with their book-keeper. The charge for wharfage and cartage in the defendant's bill, which they compelled the plaintiffs to pay before they would engage to deliver the goods, were considered as decisive to show that in this case the liability of the defendant continued until the goods were delivered. (Hyde *v.* the Trent and Mersey Navigation Company, 5 T. R. 389.)

Where goods were put on board the vessel of the defendant to be carried to Albany, and on arriving there, were by the defendant's directions put on the wharf, it was held that this was not a delivery to the consignee, although the goods were taken away (without the direction of the consignee) by a carter usually employed to transport his goods, and the greater part actually received by the consignee; and the defendant was held liable in trover for the goods not actually delivered. (Ostrander *v.* Brown, 15 Johns. Rep. 39.) Contra in Pennsylvania, in the case of a vessel engaged in the foreign trade. (Cope *v.* Cordova, 1 Rawle, 203. See Magee *v.* Potter, 2 Johns. Cas. 371.)

The unlimited responsibility imposed upon a car-

General notices.

rier, except in the two instances before mentioned, might in many cases prove oppressive, unless he were allowed to protect himself by particular stipulations. An indulgence was, therefore, formerly allowed of qualifying this general liability by reasonable limitations, not inconsistent with his common law obligation, and a carrier might, where he had just grounds for doing so, decline altogether to take charge of goods; or if he consented to accept them, he might protect himself by the special terms upon which he agreed to receive them. (Morse *v.* Slue, 1 Vent. 238. Bodenham *v.* Bennett, 4 Price, 34.) Terms of this description are of ancient date, (See 3 Taunt. 271,) and the receipt of goods upon such conditions was considered as a special acceptance, and was usually made in each particular case. But in recent times a mode has arisen of effecting the same object by means of a general notice, intimating to the public the terms upon which the carrier consents to take charge of goods; and if the notice is brought home to the knowledge of the employer, it will be considered as equivalent to a special acceptance. The importance of these notices, and the numerous questions to which they give rise, will perhaps excuse an examination into their nature and the protection they afford.

The qualification engrafted by a special acceptance, upon the carrier's obligation to carry goods, must in all cases be of a reasonable nature, and not calculated to destroy the duty imposed by the common law; and the same principle applies to the case of a notice. By a general notice, a carrier generally refuses to be liable for articles above a small sum, unless entered,

and an additional premium paid in proportion to the value of the article; and in this respect there is nothing unreasonable, for the carrier is not only to be paid for his labour, but also for the risk he incurs. His charge, however, must in all cases be reasonable, for he is bound to carry goods which are brought to him, and cannot defeat this obligation by making an excessive demand. (Harris *v.* Packwood, 3 Taunt. 272. Batson *v.* Donovan, 4 Barn. & Ald. 39. Hyde v. the Proprietors of the Trent and Mersey Navigation, 1 Esp. N. P. C. 36.) But he may not only limit his responsibility in this respect, but may in some cases exclude it altogether, as by refusing all responsibility from accident arising by fire. (Maving *v.* Todd, 1 Stark. N. P. C. 72,) and in general he will not be liable for losses arising from accident, or for theft, or robbery, when no collusion can be established on the part of the carrier; or for any want of care, unless amounting to gross negligence, or a tortious misfeasance of the property.

By these means, the wholesome provisions of the common law have not only been defeated, but the effect of these notices has been to render a carrier responsible for a less degree of care than that which is exacted from a pawnee, or any other bailee who has a reward. A warehouseman, depositary of goods for hire, or other bailee of a similar description, is responsible for the want of ordinary care; but a common carrier, although he receives a reward, is not liable for ordinary negligence; for although it is said a general notice does not exempt him from the exercise of due and ordinary care, yet the question left to the jury in such cases is, whether he has been guilty

of gross negligence. (See Batson *v.* Donovan, 4 Barn. & Ald. 21. and the cases infra.)

Their legality.

For these reasons, the legality of these notices and the policy of adopting them, have been frequently questioned, and their introduction has been lamented by many eminent and learned persons. (See Down *v.* Fromont, 4 Camp. 41. Smith *v.* Horne, 8 Taunt. 146;) but they are now established to be legal, and are daily received and acted upon in courts of justice. In the case of Nicholson *v.* Willan, (5 East, 507.) an objection to their validity came formally before the court, upon the ground of their inconsistency with the policy of the common law, and that it was the duty of carriers, if the reward was not adequate to the risk, to make a special acceptance of the goods in each case, at a rate proportioned to their value. But it was observed by Lord Ellenborough, C. J., delivering the judgment of the court, "that considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage, by land and water, has now prevailed in this kingdom, under the observation, and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases, on the ground of such a measure being unnecessary, in as much as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract: considering also, that there is no case in the books, in which the right of a carrier, thus to limit by special contract his own responsibility, has ever been

by express decision denied; we cannot do otherwise than sustain such right in the present instance, however liable to abuse, and productive of inconvenience it may be; leaving to the legislature (if it shall think fit) to apply such remedy hereafter, as the evil may require." Since this decision, the legality of these notices has been acquiesced in and acted upon; but notwithstanding they are established, the courts, discountenancing the doctrine, and restraining it as far as is consistent with the rules of law, require strict proof of the communication of the notice from every carrier, and construe with strictness the terms in which it is framed.

Communication.

The notice must proceed from the carrier; for he is bound to discharge himself from the losses to which he is subject by the general law of the realm, by a notice given by himself; and a general usage of trade is not evidence for that purpose. (Clark *v.* Gray, 4 Esp. N. P. C. 178.) But a carrier who continues the business of another carrier, is protected by a notice given and signed by the former carrier, limiting his responsibility, and which the new carrier, within the customer's knowledge, keeps hung up in his office. (Evans *v.* Soule, 2 M. & S. 1.) But a personal communication is not necessary in order to constitute a special acceptance, since the knowledge of each other's minds, which is the object of a special acceptance, if effected by other means, is sufficient. (See Gibbon *v.* Paynton, 4 Burr. 2302.) So, it is not requisite that there should be any direct and immediate communication of a general notice; it will be sufficient if the means adopted are those from whence a jury may reasonably infer that a knowledge of its con-

tents was conveyed to the person dealing with the carrier.

A direct communication is indeed rarely made; the means usually adopted for this purpose are by the publication of an advertisement in a newspaper, posting a notice in some conspicuous part of the office or place where the carrier transacts his business, or by the circulation of hand-bills. Where these means are not adopted, or prove ineffectual, other circumstances may exist from whence a knowledge of the notice may be inferred. But whatever the means may be upon which the carrier relies, he must at his peril take care that every one who deals with him is fully apprised of the limits to which he intends to confine his responsibility. (Butler *v.* Heane, 2 Camp. 415. Davis *v.* Willan, 2 Stark. 279.)

By advertisement.

Where the publication is by an advertisement in the newspaper, and there is no direct proof of knowledge, some evidence must be given to raise a reasonable presumption that a party has knowledge of it before such advertisement can be received in evidence. In one case where the notice was inserted in the Gazette, that paper was admitted as evidence although considered of little avail, without proof that he party was in the habit of reading it. (Leeson *v.* Holt, 1 Stark. N. P. C. 186.) But in a subsequent case, (Munn *v.* Baker, 2 Stark. N. P. C. 256,) this evidence was rejected without such proof; since a party might be expected to look into the Gazette for notices of the dissolution of partnerships, but not for notices by carriers of the limitation of their responsibility. There appears, therefore, to be no distinction in this respect, between a Gazette and

any other newspaper. (See Phillips on Evidence, 323. 3d ed.)

In cases of this description, a habit of reading the paper in which the advertisement is published, although there is no proof that the party has actually read or seen the particular paper in which it is inserted, will be sufficient evidence from whence to infer a knowledge of the notice. (Gibbon *v.* Paynton, 4 Burr. 2298.)

Notice affixed in offices.

Where the notice is posted in the office or place where the carrier transacts his business, it should be fixed in some conspicuous part in large and legible characters, that persons delivering goods may have ample means of seeing the terms on which the carrier conducts his business, and that they cannot fail to do so without gross negligence. (Butler *v.* Heane, 2 Camp. 415. Clayton *v.* Hunt, 3 Camp. 28.) But if a bill, which is posted upon the door of the carrier's office where he receives and delivers goods, blazons in large characters the advantages of his conveyance, but states in small characters at the bottom of it the restrictions upon his responsibility, it will not be sufficient. (Butler *v.* Heane, 2 Camp. 415.) So, this mode of communication will be insufficient, where the goods are not delivered at the office, but collected by the carrier's cart sent round to receive goods for the wagon, or received at a distance from the office; in these cases some other mode of communication must be adopted. (Clayton *v.* Hunt, 3 Camp. 27.) In the same manner, the notice will be unavailing if it should appear that the person delivering the goods does not in fact read the notice, (Kerr *v.* Willan, 2 Stark. N. P. C. 53,) whether it happens

notwithstanding he is capable of doing so, or from ignorance or inability to read. (Davis *v.* Willan, 2 Stark. N. P. C. 279.)

Hand-bills. In the case of publishing the notice by the circulation of hand-bills, the limitation should be framed in clear and distinct terms, and not at variance with any other mode of publication that may be adopted; for a hand-bill, limiting the carrier's responsibility in a less degree than a notice affixed in the office will control the latter, since a person who receives the hand-bill has a right to presume that what is circulated by the carrier's authority, contains the whole of the limitations he intends to put upon his common law responsibility as a common carrier, and gives a full statement of the special contract into which he enters with his customers. (Cobden *v.* Bolton, 2 Camp. 108.)

Particular circumstances. If none of those means are adopted, or if they prove ineffectual, other circumstances may be sufficient from whence a jury may infer the required knowledge.' Thus, notice to the vendor of goods that the carrier by whom he sends them limits his responsibility, is equivalent to notice to the vendee who directs them to be sent, for he is bound by the acts of the vendor and his agents in this respect. (Maving *v.* Todd, 1 Stark. 72. See Clarke v. Hutchins, 14 East, 475.) So, an acquiescence in the loss of parcels sent by a carrier who had published a general notice, and a direction to the person sending the parcels to insure them for the future, would be evidence to show a knowledge of the notice. (Roskell *v.* Waterhouse, 2 Stark. N. P. C. 462.)

Waiver. In cases in which a carrier is protected by a gene-

ral notice, he must be cautious not to do any act by which the notice may be waived; for if so, he will lose the benefit to which he would otherwise be entitled. (Evans *v.* Soule, 2 M. & S. 1.) Thus, a carrier who had given notice that he would not be accountable for goods of a particular description, above the value of 5*l.* unless specified, and paid for as such when delivered, is nevertheless liable for damage done to an article coming within that description, although the terms of the notice were not complied with, the book-keeper having been informed of its value, and desired to charge for it what he pleased, which should be paid provided it was taken care of. Lord Ellenborough, C. J. decided, that under these circumstances, the payment of the money was dispensed with, and the notice unavailing. (Wilson *v.* Freeman, 3 Camp. 527.) But a carrier entitled to the benefit of his notice does not waive it altogether, by paying for goods lost or damaged, without inquiring whether it was occasioned by the negligence of his servants; this is but carelessly settling his accounts; he may waive a right, *pro hac vice*, without abandoning it altogether. (Evans *v.* Soule, 2 M. & S. 1.)

The mere knowledge, however, that the article is above the stipulated value, will not have this effect. A notice, that a carrier would not be answerable for any goods of what nature or kind soever, above a certain value, unless the terms of the notice were complied with, was considered not to apply to a case where the carrier was perfectly aware that the goods, in this instance a cask of brandy, were above the stipulated sum, or where the goods, being of large bulk and known quality, must be obviously above

that sum. (Beck *v.* Evans, 16 East, 244. 3 Camp. 267. S. C.) And in another case, where the known value of the goods was relied upon in answer to a notice set up by the carrier, Lord Ellenborough, C. J. observed, that the appearance of the goods must necessarily indicate that they are above the stipulated value, in order to deprive the carrier of the benefit of his notice. (Down *v.* Fromont, 4 Camp. 40.) But in a subsequent case, where a parcel, containing a quanty of guineas, was delivered to the book-keeper of a mail-coach office, to be forwarded to London, who was aware of its contents, and for greater security deposited it in the banker's bag, notwithstanding, which it was lost; it was decided by Gibbs, C. J. that the mere knowledge that the value of the parcel exceeded the sum for which the carrier would be answerable, unless they were duly entered and paid for accordingly, did not deprive the carrier of the benefit of his notice. (Levy *v.* Waterhouse, Selw. N. P. 388. 4th ed. 1 Price, 280. S. C.)

Where a notice requiring an additional premium, according to the value of the article, is not complied with, it would appear that the owner, by declining to pay the enhanced premium, takes upon himself the risk against which that payment would secure him, and cannot look to the carrier, to sustain it; and accordingly the doctrine contained in the latter case is that which now prevails. The only effect of knowledge in such a case would be to render the carrier responsible for a degree of care proportionate to the nature and value of the article.

Notice, its form and construction.

If the notice has been fully communicated, and not waived by any act on the part of the carrier, he will

be entitled to set it up as a limitation upon his responsibility. The extent of the protection afforded by it will depend upon the language in which it is framed; yet as no general form is adopted, a separate one being usually given by each carrier, no general rule can be laid down upon the subject. But the language of the notice, and the terms of limitation imposed by it, should be clear and unambiguous, and free from all artifice or attempt to deceive; for, if the words are doubtful, they will be construed against the carrier, and any artifice will render it unavailing. (See Butler *v.* Heane, 2 Camp. 415.)

There should also be no doubt or contradiction arising as to the extent of the limitation intended to be imposed; for where different notices are published, which are inconsistent in their terms, the carrier will be bound by that which is least beneficial to himself, as where a notice is circulated by handbills, and also affixed in the office; but the limitation imposed by the latter is more extensive than the former, he will be bound by the notice contained in the hand-bill. (Cobden *v.* Bolton, 2 Camp. 108.) So, where a notice was given to the person delivering the goods, which contained a restriction upon the defendant's liability in a less degree than a notice put up in his office, he was holden to be bound by the former. (Mum *v.* Baker, 2 Stark. N. P. C. 256.)

A few instances will explain the manner in which these notices have been received and interpreted by the courts.

In a case in which the terms of the notice were, "that cash, plate, jewels, writings, or any such kind of valuable articles, would not be accounted for, if lost, of more than 5*l.* value, unless entered as such,

and a penny insurance paid for each pound value," the court were of opinion, that the sense of the printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable, and the plaintiff accordingly did not recover any thing. (Clay *v.* Willan, 1 H. Bl. 298. See a similar notice in the cases of Nicholson *v.* Willan, 5 East, 507. Harris *v.* Packwood. 3 Taunt. 264.) where the plaintiffs, not having complied with its terms, were not allowed to recover to any extent. So, where the notice was in these words: "Take notice, that the proprietors, &c. at this office, will not be accountable, &c. for any goods or package whatever, if lost or damaged, above the value of five pounds, unless insured and paid, &c." the court said, "They could not help giving effect to those terms in the notice, by which, inasmuch as the goods in question were above the value of 5*l.* and not insured, or paid for at the time of delivery, the defendants could not be held accountable at all." (Izett *v.* Mountain, 4 East, R. 371.) But, since a person cannot stipulate against the consequences of his own fraud, (Doctor and Stud. 278. Dial. 2 c. 38. Noy's. Max. 92,) a general notice, in whatever language it may be framed, will not protect the carrier from any want of care which amounts to gross negligence, or from any tortious misfeasance, with reference to the goods, or other circumstances which may he considered as evidence of fraud. "These special conditions were introduced for the purpose of protecting carriers from extraordinary events, but were not made to exempt them from due and ordinary care." (Per Wood, B. in Bodenham *v.* Bennett, 4 Price, 34.)

In the same manner, since a carrier is responsible for the acts of his servant, in those things which respect his duty under him, if the misconduct from which the loss arises proceeds from the servant, the carrier will be equally liable, notwithstanding a general notice, for it will not protect him from a responsibility for losses arising from his misconduct. (Ellis *v.* Turner, 8 T. R. 831. Garnett *v.* Willan, 5 B. & A. 57.) The terms, "lost or damaged," which are usually found in the notice, are not to be construed in their largest sense, but to be understood with this qualification; "the carrier himself doing nothing by his own voluntary act, or the act of his servants, to devest himself of the charge of carrying the goods to the ultimate place of destination. (Per Bailey, J. in Garnett *v.* Willan, 5 Barn. & Ald. 57.)

The following cases will show the degree of care required from a carrier, notwithstanding a general notice, and the particular circumstances which have been decided to constitute such gross negligence as to deprive the carrier of the benefit of his notice.

A notice by several lightermen in these words, "We, &c. will not be answerable for any loss or damage which shall happen to any cargo which shall be put on board any of our vessels, unless such loss or damage shall happen, or be occasioned by want of ordinary care and diligence in the master or crew of the vessel; in which case we will pay 10*l.* per cent. upon such loss or damage, so as the whole amount of such payment shall not exceed the value of the vessel and the freight;" was construed not to extend to protect the carrier from a loss happening by his personal default, and the not providing a sufficient vessel, but to

limit his responsibility in those cases only where the law would otherwise have made him answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against. (Lyon *v.* Mills, 5 East, 439.) So, where a notice was given, similar to the one in the last case, by the defendant, who was the owner of a vessel trading from Hull to Gainsborough, and had taken on board some goods belonging to the plaintiffs, which were to be delivered at Stockwith; the vessel went safe as far as Stockwith, and there delivered part of the cargo, but the master of the vessel finding it inconvenient to deliver the rest there, she proceeded on her voyage, and sunk before her arrival at Gainsborough. In an action for the value of the goods, the defendant was holden responsible for the loss thus occasioned by the misconduct of his servants. (Ellis *v.* Turner, 8 T. R. 531.)

In the same manner, where a cask of brandy properly packed, was delivered to the defendant, to be carried from Shrewsbury to London, which in the course of the journey began to leak considerably, within the wagoner's knowledge: he, however, proceeded on to Birmingham, where he staid three hours, but took no steps to stop the leakage; but proceeding on to Wolverhampton, the next stage, where he also made some stay, he there also neglected the leak, although it was increasing; however, at the next stage, having some parcels to deliver, he then took out the cask, and the remainder of the brandy was saved. The defendant was held liable for the loss, notwithstanding he had circulated a general notice, known to the plaintiff, but not complied with, that he

would not be liable for cash, bank-notes, jewels, and other valuable articles, or any other goods, of what nature or kind soever, above the value of 5*l.* if lost or damaged, unless there was a special agreement, and an additional premium paid, upon the ground, that he did not stipulate for exemption from the consequences of his own misfeasance; and if goods are confided to him, and it is proved that he has misconducted himself, in not performing a duty which by his servant he was bound to perform, that is a misfeasance, from which, if the goods thereby become damaged, his notice will not protect him. (Beck *v.* Evans, 16 East, 247.) In Garnett *v.* Willan, (5 B. & A. 61,) Mr. Justice Holroyd, commenting upon this case, observed, that the defendant was held liable on the ground that the loss accrued from the gross negligence of defendant's servant. So, where a banker's parcel was delivered to the driver of the defendant's coach, which ran from Hereford to Brecon, and thence to Carmarthen, directed to the plaintiff's correspondent at Brecon, the book-keeper who received the parcel was aware that it contained bank-notes, and the plaintiff also knew that the defendant was not liable for losses beyond 5*l.* unless an extra charge was paid, which was not done in the present instance. The parcel having been lost, in an action to recover the value, it appeared that the parcel was regularly entered in the way-bill, and put in the back seat of the coach; but, upon the arrival of the coach at Brecon, the book-keeper at that place took out the other parcels, but neither looked for, nor made any inquiry about the parcel in question, trusting, as he said, to the coachman, who on that day was intoxicated,

though not so much as to incapacitate him entirely from attending to his duty. The plaintiff obtained a verdict, which the court refused to set aside, upon the ground that there was gross negligence in the carrier, from which his notice would not protect him. (Bodenham *v.* Bennett, 4 Price, 31. Vide Levi *v.* Waterhouse, 1 Price, 280. Birkett *v.* Williams, 2 B. & A. 356.) So, in a case in which a parcel was lost in the course of delivery, where it appeared to be usual for carriers to send two persons with the cart employed for that purpose, and that the defendant in general sent two, but in this instance sent only one, during whose absence, in delivering other parcels, the one in question was stolen; the jury having found, that this was gross negligence in the defendant, the court coincided in that opinion, and the defendant was deprived of the benefit of the notice, to which he would otherwise have been entitled. (Smith *v.* Horne, 8 Taunt. 144.)

In an action, however, against the proprietors of a stage-coach for the loss of a parcel containing 100*l.* it appeared, that the coachman had given notice that he would not be answerable for money or jewels, or other valuable articles, unless he had notice of the valuable articles delivered to him, and that the plaintiff had knowledge of the notice, but had not given the required information. The money was sent, hidden in hay, in an old bag, and was delivered to the defendant's book-keeper as an ordinary parcel, without any mention being made of the nature of its contents. The defendant was holden not to be liable for the value of the parcel, by reason of the fraud practised upon him in the concealment of its contents,

with full knowledge that the defendant had refused to be responsible for such parcels without such information. (Gibbon *v.* Paynton, 4 Burr. 2298. See Batson v. Donovan, infra.) So, where the plaintiffs, who were bankers at Berwick and Newcastle, delivered a box containing bills, cheques, and notes, of the value of 4072*l.* to the defendants, who were the owners of a coach travelling through Berwick to Newcastle, and had given notice that they would not be answerable for parcels of value, unless they were entered and paid for as such; the box was delivered to the defendants directed to the plaintiffs at Newcastle, with only this observation, "It is the box for Newcastle," and although the plaintiffs knew of the notice, no additional premium was paid, nor was any thing said as to its contents, nor did it appear that the defendants knew that it contained articles of value. The coach arrived at Berwick at twelve at night, and during its stay there, which was about half an hour, it stood in the middle of the street, about thirty yards from the pavement. About a quarter of an hour after the arrival of the coach, the box was placed in the boot of the coach, and a porter placed to watch it, but, notwithstanding, the parcel was stolen from the boot, whilst he was so stationed. Under these circumstances, the jury having found that the plaintiffs had not dealt fairly with the defendants, in not disclosing to them that the box contained articles of value, and that the defendants were not guilty of gross negligence, the court afterwards concurred in that opinion, and refused to grant a new trial. (Batson *v.* Donovan, 4 B. & A. 21.)

A general notice will also afford no protection to a

carrier, where the loss arises from a misfeasance, as in the misdelivery of goods, whether committed by him or his servants; unless, indeed, the party contracts exclusively with the latter, in which case the carrier will not be liable for their acts. (Allen *v.* Sewall, 2 Wend. R. 327.)

A counterfeited order for a quantity of cochineal having been sent to the plaintiffs by a letter signed in the name of "J. Worthy," and dated Exeter, they having had previous dealings with a person at that place of the name of Jonathan Worthy, accordingly executed the order, and delivered a box containing the article in question to the book-keeper at the defendant's office. The coach reached Exeter on Saturday, and on that evening a person inquired if such a box had arrived, and was told that parcels were not sent out on Sunday, but that it might be had by being sent for. On Sunday night a labouring man called at the coach-office, and asked for Mr. Worthy's box, and upon being asked by whom he was sent, he replied, he did not know the person, but it was a man in the street. The book-keeper observing he had two packages for Mr. Worthy, the one a box, and the other a small parcel, the man replied that he had money to pay only for the box, but that he would ask the person who sent him, for money for the other. He went out for that purpose, and on his return declined taking any thing but the box, which was accordingly delivered to him. The defendants proved that a public notice not to be liable for packages of this description, without an additional premium, was affixed in their office; but the porter who carried the parcel to the office, swore, that he did not see the no-

tice, and it was not proved that the plaintiff himself had any knowledge of the contents of such notice. The defendants, however, having obtained a verdict, a new trial was granted, upon the ground of a misdirection upon the question of gross negligence. (Birkett *v.* Willan, 2 B. & A. 356.) And Bailey, J. in commenting upon this case (in Garnett *v.* Willan, 5 B. & A. 58.) observed, that the carrier, by the wrongful act of his servant, had devested himself of the charge of carrying the parcel to its ultimate place of destination; for it was his duty to carry it to the house of the person for whom it was intended at Exeter, if he found the person for whom it was directed, or to keep it in order to make due inquiry to find him out. And that the court were of opinion, that this being a case of gross negligence, was a loss not protected by the terms "lost or damaged," inserted in the notice. So, where the plaintiffs sent a parcel containing a quantity of silks, and other articles, by the defendant's wagon, directed to "Mr. James Parker, of High-street, Oxford;" and on the morning after the arrival of the wagon, the defendant's porter, upon application to that person found that the parcel was not for him. Shortly afterwards, a person of the name of Parker, of whom there were several resident in Oxford, though none in the High-street, of the above Christian name, and to whom goods had before been delivered when directed to Mr. Parker, Oxford, to be left till called for, came to the defendant's office, and seeing the parcel directed as before mentioned, he claimed it as his own, and, on paying for the carriage, the parcel was delivered to him. The defendant had given a general notice, not to be liable for parcels similar to the one in question, unless specified

when delivered at the office, with which the plaintiffs had not complied. In an action to recover the value of the goods, the court held, that as the parcel was directed to a particular house, to which the defendant was bound, by the ordinary course of his trade, to deliver it, the delivery to a person whose residence was unknown, after it had been refused by the person to whom it was directed, amounted to gross negligence in the defendant, for which he was responsible, notwithstanding his general notice. (Duff *v.* Budd, 3 Bro. & Bing. 177.)

A carrier, like every other person who enters into a contract, is bound to perform his engagements in the mode and to the extent for which he has contracted; and consequently, where a carrier has undertaken the conveyance of goods, he cannot relieve himself from his responsibility by transferring them to another carrier, or by sending them by a different conveyance from that in which he undertook to carry them. If his engagements are violated in either of these respects, and the goods are in consequence lost, he will be responsible notwithstanding he may be in other respects entitled to the benefit of a general notice,

The plaintiffs, resident at Worcester, having written to their correspondent at London, to send them a quantity of goods "by the return of mail," a parcel containing them was accordingly delivered at the coach-office, whence the Worcester mail-coach proceeded, and booked "as for the Worcester mail-coach to Worcester," of which coach the defendants were the proprietors. The parcel was accordingly put into that coach, and entered in the usual way-bill as a parcel to be carried from London to Worcester, and actually carried from the inn whence the coach

started, to an inn in Oxford-street, at which the defendants had no office or servant, but where passengers and parcels were booked for their coach. At this place the parcel was taken out of the mail-coach, and there left to be forwarded on the following day by another Worcester coach, in which one of the defendants had no interest, and from which the parcel was lost, but by what means did not appear. The defendants had given a general notice, which was known to the plaintiffs, not to be liable for the loss or damage of goods of the value of those in question, without an additional premium beyond the common carriage price, but which was not paid. Under these circumstances, the defendants were holden responsible for the loss, on the ground that the delivery and acceptance of the parcel on the part of the defendants, entitled the plaintiffs according to their contract, not merely to the care and diligence of one, but of both of the defendants; and that as they had, by the act of their servant, wrongfully devested themselves of the charge of carrying the parcel to its ultimate place of destination, they were not protected by their notice. (Garnett *v.* Willan, 5 B. & A. 53.) So, where a banker's parcel of considerable value was delivered to the defendants, addressed to the plaintiff's clerk, with the direction, "R. Angier, Christ-church, Hants, per mail," and entered by the defendants' book-keeper, to go by the mail of which they were the proprietors; but, instead of sending it by this conveyance, the defendants sent it by the Southampton light coach, the proprietors of which were different from those to whom the mail belonged, and by which the risk of the conveyance was increased. The parcel having been

lost, the defendants, upon the principle of the former case of Garnett *v.* Willan, were holden responsible for the value, notwithstanding a general notice, to which they would otherwise have been entitled, not merely as a case of negligence in the performance of their contract, but of a refusal altogether to perform it, in receiving the parcel to be conveyed by one coach, and sending it by another, of which all the same persons were not proprietors. (Sleat *v.* Fagg, 5 B. & A. 342.) But where the defendants were the owners of two coaches, a mail and a heavy coach, travelling to the same place, and a parcel was delivered and accepted for the purpose of being sent by the mail, but by an entry in the defendants' book, it appeared to have been booked for the heavy coach, but no evidence was given that it was put into or carried by either coach, or in what manner the parcel was lost, whether in the warehouse, or in the course of its conveyance, the defendants were holden not to be deprived of the benefit of their general notice. On the part of the plaintiffs it was contended, that the defendants were liable for the value of the parcel, notwithstanding a notice had not been complied with, on the ground that the loss had not been incurred in the course of their employment as carriers, but occasioned by an act of tortious conversion in direct contravention of the terms on which the goods were delivered to and accepted by them. But it was observed by Lord Ellenborough, C. J., delivering the judgment of the court, "that to found this argument, there was no other evidence but the mere fact of booking the goods for a different coach, and a subsequent non-delivery, which can amount to no

more than a negligent discharge of duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect to the goods in question." (Nicholson *v.* Willan, 5 East, 506. See Garnett *v.* Willan, 5 Barn. & Ald. 59. Barnwall *v.* Hussy, 1 Const. Rep. S. C. 114.)

Obligation to deliver.

The duty of a carrier with respect to the delivery of goods at the houses of the persons to whom they are directed, is not established with the same precision as the duties which have been before enumerated. Where it is the general course of his trade to deliver goods in this manner, he will be bound to do so, for by the receipt of them, he will be understood to have contracted for their conveyance on the same terms, and in the same manner in which he usually transacts his business with respsct to other persons. (Golden *v.* Manning, 3 Wils. 429. S. C. 2 Bl. Rep. 916. Hyde *v.* The Trent and Mersey Navigation Company, 5 T. R. 396. Catley *v.* Wintringham, Peake, N. P. C. 150. Mayell *v.* Potter, 2 Johns. Cas. 371.) But where no such usage exists, it has not been judicially determined that by the common law the carrier is bound to perform this duty although there are various dicta which incline to support that proposition. In the case of Hyde *v.* The Trent and Mersey Navigation Company, (5 T. R. 396,) where the general question was agitated, Ashhurst, Buller, and Grose, Js. were of opinion that the carrier was so bound; but Lord Kenyon, C. J. observed, that the leaning of his mind then was that the carrier was not liable to that extent. In a more re-

cent case, it was also observed, that a carrier does not only engage safely to carry goods, but also deliver them. (Per Wood, B. in Bodenham *v.* Bennett, 4 Price, 34., cited by Dallas, C. J. in Duff *v.* Budd, 3 Bro. & Bring. 182.) But if a parcel is directed to a person generally, as to A. B. at Exeter, without specifying his place of abode, the carrier is not bound to carry that parcel to any place, but will fully discharge his duty by delivering it at his office, to any person coming from A. B., or whom he may reasonably presume to come from him. (Per Abbott, C. J. Birkett *v.* Willan, 2 Barn. & Ald. 358.) But Bailey, J. in commenting on this case, in Garnett *v.* Willan, (5 Barn. & Ald. 58.) observed, that it was the carrier's duty to carry the parcel to the house of the person to whom it was intended at Exeter, if he found the person to whom it was directed, or to keep it in order to make due inquiry to find him out.

In the case of foreign commerce, where the carriage of goods is regulated by a bill of lading, or other instrument, this duty is generally governed by the particular terms of the engagement. (Catley *v.* Wintringham, Peake, N. P. C. 150. Strong *v.* Natally, 1 Bos. & Pul. N. R. 16. Gosling *v.* Higgins, 1 Camp. 451. Vid. Cope *v.* Cordova, 1 Rawle, 203.)

Carrier's rights.

The primary and important right which the carrier possesses, is to secure the payment of his charges for the carriage of the goods, and for this purpose the law has invested him with ample remedies. He may, in the first instance, refuse to take charge of goods unless previously paid the price of their carriage, or having conveyed them to their place of destination, he may decline delivering them without such previous

payment. (Per Abbott, C. J., 5 Barn. & Ald. 353,) and in the event of waiving these rights, he may maintain an action against the consignor by the common law. (Moore *v.* Wilson, 1 T. R. 660,) or against the consignee by agreement, either expressed or implied.

Payment on delivery.

A carrier is not compellable to receive goods without a previous tender of the charge of their carriage, but this is seldom the object of discussion, since, in the event of the performance of the contract, the carrier is entitled to detain them until his charges are paid. This, which is a far more important privilege, is enjoyed by a carrier in common with every other bailee, and exists in all cases unless extinguished by a special agreement with which it is inconsistent. (Per Gibbs, C. J. in Hutton *v.* Bragg, 2 Marsh. 345. Story, Bailm. 373.) A review of some of the leading principles by which this right is governed, will show its particular nature, and the protection it confers, so far as relates to the present subject.

Right of lien.

A right of lien consists in a power of detaining articles, until the charges for labour or expense incurred upon them has been satisfied, and is of two descriptions, a particular lien which is given, and favourably interpreted by the common law, and a general one, which exists only by usage or agreement between the parties, and is construed with more or less strictness according to its object. (Per Heath, J. 3 Bos. & Pul. 494. Lord Kenyon, C. J. 1 Esp. N. P. C. 109. Lord Mansfield, C. J. 4 Burr. 2221. Kirkman *v.* Shawcross, 6 T. R. 14. Rushforth *v.* Hadfield, 6 East, 519. 7 East, 224. 2 Rose, 355. 1 Dane Abr. 262.)

This right, which probably owes its origin to the obligation imposed by law upon persons professing to perform particular services which public convenience requires, should be extended, upon principles of natural justice, to every case where expenses have been incurred upon a particular article. It is like a distress at common law, simply a mean of securing and compelling a payment of the charges incurred, and does not extend to authorize a sale of the article for that purpose. (2 Roll. Abr. 85. A. pl. 5. 1 Vent. 71. Yelv. 67. Jones *v.* Thurloe, 8 Mod. 172. Jones *v.* Pearle, 1 Str. 556. Chase *v.* Westmore, 5 Maule & Selw. 185.) Such a power, however requisite in certain cases to render the right effectual, is not recognised by the law of England, although to be found in the civil law, as existing in the individual entitled to the right, or in any tribunal under whose sanction and controul it might be exercised. (1 Bulst. 207. Bacon's Abr. tit. Inns. Story, Bailm. 209.)

The right of lien is one of the terms implied by law in the contract, but may be waived by a special agreement with which it would be inconsistent. "Where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise." (Per Lord Ellenborough, C. J. in Stevens *v.* Blakelock, 1 Maule & Sel. 543. See also Cowell *v.* Simpson, 16 Ves. 275. Chase *v.* Westmore, 5 Maule & S. 186.) In the older books, indeed, it is laid down, that if there is a special agreement there can be no lien, and various authorities may be cited in support of that proposition. "If a person, who would otherwise have a right to detain the personal chattel of ano-

ther, for the trouble or expense he has been at concerning it, contract to be paid a sum certain for the trouble or expense, he does thereby waive the right of detaining the chattel." (Bacon's Abr. tit. Trover, E. 44. See also, 2 Roll. Abr. 92. M. pl. 2. 6 Cro. Car. 271. Yelv. 66. Bremin *v.* Currint, Bull. N. P. 45 a. Bridgman's ed. Collins *v.* Ongly, per Holt, C. J. cited by Ryder, C. J. in Brenan *v.* Currint, MS. Selw. N. P. 1280, 4 ed.) But this doctrine has in some late cases been restricted to agreements prescribing a particular time and mode of payment which would be incompatible with the implied right. (Per Gibbs, C. J. in Hutton *v.* Bragg, 2 Marsh. 345. Chase v. Westmore, 5 Maule & Selw. 180.) And, therefore, an agreement for the payment of a fixed sum will not have that effect, as where a quantity of corn was delivered to a miller to grind, for which it was agreed that 15*s.* per load should be paid, but no time fixed for the payment; in this case, the miller was decided to be entitled to his right of lien. (Chase *v.* Westmore, supra.) But where by the usage of trade the wharfage dues upon goods were to be paid by the importer at the Christmas following the importation, whether or not they were in the mean time removed, and the goods were sold in the preceding October, and part delivered before Christmas; the wharfinger, in consequence of the bankruptcy of the importer in the March following, detained the residue for his lien in respect of the charges for wharfage, the court, however, held that he was not entitled to do so, since not having any such right at the time of the sale, he could acquire none against the buyer by the subsequent default of the seller. (Crawshay *v.*

Homfrey, 4 B. & A. 50.) So, a shipwright in the river Thames has no lien on a ship taken into his dock to be repaired without an express agreement for that purpose, since, by the usage of trade, credit for repairs is given to the owner of the ship; but it would be otherwise where payment was to be made in ready money, or there was an agreement that security should be given when the work was completed. (Railt *v.* Mitchell, 4 Camp. 146. See Horncastle v. Farren, 3 B. & A. 497.)

A right of lien, however, is only co-existent with the possession of the article, and being once parted with, cannot be revived by any subsequently acquired possession. (Kinlock *v.* Craig, 3 T. R. 119. Sweet *v.* Pym, 1 East, 4.) If therefore, a person has a lien upon goods in his possession, and deliver them to a carrier consigned on account, and at the risk of his principal, he cannot upon the event of his bankruptcy, stop them in transitu, and procure them to be redelivered to him by virtue of a bill of lading signed by the carrier in the course of the voyage. (Sweet *v.* Pym, supra. See Man *v.* Shiffner, 2 East, 523. Hunter *v.* Prinsep, 10 East, 378.) And being also of a personal nature, it cannot be transferred to another by any tortious pledge of the property in respect of which it is claimed. (M'Combie *v.* Davis, 7 East, 6. Daubigny *v.* Duval, 5 T. R. 606.) But it may be otherwise, where one who has a lien delivers the goods to a third person as a security with notice of his lien, and appoints him to continue in possession as his servant for the preservation of his lien. (M'Combie *v.* Davis, 7 East, 6.)

A shipmaster does not forfeit his lien for freight by

depositing the goods in the King's warehouse, according to the requisition of an Act of Parliament. (Per Lord Ellenborough, in Ward *v.* Felton, 1 East R. 507.)

Having premised these general principles, it may be observed that a particular lien extends only to the individual article in respect of which the charges have been incurred for which the right is claimed. (Per Heath, J. 3 Bos. & Pul. 494. See 4 B. & A. 343; Hartshorne *v.* Johnson, 2 Halst. Rep. 108.) But where a quantity of goods are delivered in separate parcels at different times, yet if they form the subject of one entire agreement, the right of lien attaches upon each part of the expenses incurred with respect to the whole. (Chase *v.* Westmore, 5 M. & S. 181. Blake *v.* Nicholson, 3 M. & S. 167. See Sodergren *v.* Flight, cited 6 East, 622.) A carrier, by the common law, is entitled to this right, and may justify the detention of goods, until he is paid the carriage price of the particular articles on which his hire is due. (Skinner *v.* Upshaw, 1 Lord Raym. 752. Hayward *v.* Middleton, 1 Const. Rep. S. C. 186. Hartshorne *v.* Johnson, 2 Halst. Rep. 108.) So, the master of a vessel has a lien upon the luggage of a passenger for the passage-money agreed to be paid; or when there is no agreement for a fixed price, until he is paid a reasonable sum. (Wolf *v.* Summers, 2 Camp. 631.) In the same manner, a carrier by water is entitled to a lien for his freight. Sodergren *v.* Flight, cited 6 East R. 622.) Particular lien.

Freight is a lien upon the cargo. (Cowing *v.* Snow, 11 Mass. Rep. 415. Gracie *v.* Palmer, 8 Wheat Rep. 605. 4 Mass. Rep. 91. 6 Mass. Rep. 422.)

And where the owner of a vessel covenanted by

charter party to let the vessel on freight, and to deliver the cargo in good condition, and the freighters covenanted to pay the freight on delivery of the cargo, part in money, and the remainder by bills at four months; it was decided, that the owner might detain the cargo until payment of the freight, the delivery of the cargo and the payment of the freight being concurrent acts. (Yates *v.* Rollin, 8 Taunt. 293. See Hutton *v.* Bragg, 2 Marsh. 345. Christie *v.* Lewis, 2 Bro. & Bing. 410. Saville *v.* Campion, 2 B. & A. 503.)

A captain of a vessel who is personally responsible for articles furnished to the ship, is thereby entitled to a lien on the goods as well as freight; and if a consignee, after notice from the captain, pay the freight to the owners, he will still remain liable to the captain. (Waring *v.* Bell, 4 Esp. N. P. C. 22.) But the captain has no lien on the ship for money expended, or debts incurred for repairs done abroad in the course of the voyage. (Hussey *v.* Christie, 9 East, 426. See Abbott on Shipping, 137.)

General lien.

A right of general lien is not limited to the particular article upon which expenses have been incurred, but extends to all goods in the possession of the party claiming it for the balance of the general account between the parties. (Per Heath. J., 3 Bos. & Pul. 494.) The common law does not recognise this right, but it may exist by special agreement; and in the case of a common carrier, upon whom the law imposes certain duties, stricter proof is required than in the case of persons who are not subject to such obligations. "Growing liens are always to be looked at with jealousy, and require stronger proof; they are encroachments on the common law." (Per Lord

Ellenborough, C. J., in Rushforth *v.* Hadfield, 7 East, 229.)

A carrier may establish a claim to his right by a special contract with his customer in the particular case, or it may be inferred from the usual course of their dealings. (Rushforth *v.* Hadfield, 6 East, 522., 7 East, 224.) So, a general notice may be sufficient for this purpose. But notice given by a carrier "that all goods from whomsoever received, or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the person to whom they are consigned or addressed," was decided not to extend, as against the principal, to goods transmitted to a mere factor for the debt due by him to the carrier. However, such an agreement, it appears, between the carrier and the owner of the goods, may be binding. (Wright *v.* Snell, 5 B. & A. 350.) The right may also exist by usage of trade; but to establish the claim upon this ground it is necessary that the usage should be general and uniform, and of such notoriety, that persons dealing with the carrier may fairly be presumed to have dealt with him with reference to such usage. Evidence of a few recent instances of the exercise of this right by carriers will not be sufficient. (Rushforth *v.* Hadfield, 7 East, 224.) But in an action of trover against a carrier for goods which he claimed to detain by reason of a general lien, this right was established, by evidence of the defendant having before claimed, and been allowed to retain for his general balance, both against bankrupt estates and solvent customers, and also by the evidence of a principal carrier on the

western road to the same effect, respecting himself. (Aspinall, assignee of Howarth, *v.* Pickford, 3 Bos. & Pul. 44. n. *a.*)

In cases of this description, the agreement, or usage relied upon, must in general be proved; but the proof of usage of trade has in some cases been dispensed with. In the case of Naylor *v.* Mangles, (1 Esp. N. P. C. 109,) where the sole question was, whether a wharfinger had a lien for the balance of his general account upon the goods in his possession, Lord Kenyon, C. J., observed, that a lien from usage was matter of evidence, and that the usage in the present case had been proved so often, that it should be considered as a settled point, that the wharfinger had the lien contended for. And in the case of Spears *v.* Hartley, (3 Esp. N. P. C. 81,) Lord Eldon, C. J., on the authority of the preceding case, held that a wharfinger had such lien; and further, that, although the statute of limitations had run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien, for the debt is not discharged by the statute, but only the remedy. (See Crawshay *v.* Homfrey, 4 B. & A. 50.) An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods in transitu. (Oppenheim *v.* Russel, 3 Bos. & Pul. 42.) So, a carrier who, by the usage of particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent

by the consignor. (Butler *v.* Woolcott, 2 N. R. 64.)

Consignor's liability.

The consignor is responsible by law to the carrier for his charges in the carriage of the goods, and the carrier may consequently maintain an action against him for their amount. In an action by the consignors for not safely carrying and delivering goods sent by the plaintiffs, the declaration alleged that the defendant undertook to carry the goods "for a certain hire and reward to be paid by the plaintiffs," and upon proof at the trial that the consignee had agreed to pay it, the plaintiffs were nonsuited; but upon application to set aside this nonsuit, Buller, J., before whom the cause was tried, observed, that on considering the question, he found he had been mistaken in point of law; for that, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable; and the other two judges being of the same opinion, the rule was made absolute without further argument. (Moore *v.* Wilson, 1 T. R. 659. But see Dawes *v.* Peck, 8 T. R. 334.) In an action for freight, damage done to the goods by bad stowage cannot be given in evidence, either as a complete defence or in mitigation of damages. (Sheels *v.* Davis, 4 Camp. 119.)

Delivery between Consignor and Consignee.

The seller is bound to follow the directions prescribed by the purchaser, in the execution of an order for sending goods, (Cooke *v.* Ludlow, 2 N. R. 119. Hawkins *v.* Rutt, Peake, N. P. C. 186,) since he sustains the risk of their conveyance; but, in the absence of any specific directions upon that subject, the seller will be considered as duly performing his part

of the contract, if he send them by the usual and accustomed mode of conveyace. (Clark *v.* Hutchins, 14 East, 475. 1 Stark. N. P. C. 17.) The seller in forwarding goods will not be responsible for a loss where he has not been guilty of negligence; as where the plaintiff received an order to send certain goods to the defendant living at Bristol, by any conveyance which would reach that place, informing him when they were sent, that he might know when to expect them: the goods were accordingly delivered to a wharfinger to go by a particular vessel, directed to the defendant, and a letter written informing him of the fact; this vessel, however, being full, they did not go by that conveyance, but were sent by another vessel on the following day. The defendant made repeated inquiries after the goods without success, but never wrote to the plaintiff to apprize him of the circumstance. The goods having been lost, it was decided, in an action against the defendant for the value of the goods, that the wharfinger was not, in any degree, the agent of the plaintiff, but of the defendant, by whose order and directions the goods were sent, and that no negligence was imputable to the plaintiff, for not inquiring after the vessel, but that the defendant should have given due notice that they had not been received. (Cooke v. Ludlow, 2 N. R. 119.)

Effect of such delivery.

The effect of a delivery of goods to a carrier, on behalf of the buyer, is to vest the property in him absolutely from the time of the delivery, and to render him responsible for any injury they may afterwards sustain. (Dutton *v.* Solomonson, 3 Bos. & Pul. 582. Dawes *v.* Peck, 8 T. R. 330. Morberger *v.* Hackenburg, 13 Serg. & R. 26.) And if

the consignee at the moment of delivery is under age, although he attain his full age before he receives the goods, he may rely upon his infancy as a defence to an action for the value of the goods. (Griffin *v.* Lanfield, 3 Camp. 255.) This general principle is not affected by the consignor paying for the booking of the goods, (Dawes *v.* Peck, 8 T. R. 330.,) or by his being responsible to the carrier for the price of the carriage, for that does not make him an insurer of the goods while under the carrier's care. (King *v.* Meredith, 2 Camp. N. P. C. 639.) The rule also prevails not only when goods are sent from one part of England to another, but also to the case of goods sent from England to a foreign country; for, whether the goods are delivered on board a vessel abroad, to the order of a person resident in this country, (Godfrey *v.* Furze, 3 P. Wms. 186,) or sent from hence to the order of persons resident abroad, (Brown *v.* Hodgson, 2 Camp. 36,) the property equally vests in the consignee. There is also no distinction between the cases where the carrier is named by the consignee, and where he is not named; in both cases the property vests in him upon the delivery. In Vale v. Bayle, (Cowp. 296,) the seller had been in the habit of sending goods to the buyer by water, but in the pursuance of a letter, desiring them to be sent by a particular carrier by land, he sent them according to his directions, and the delivery was holden to vest the property in the buyer. (See Dawes *v.* Peck, 8 T. R. 330.) So, in the case of Dutton *v.* Solomonson, (3 Bos. & Pul. 582.,) upon an objection that the property did not vest in the vendee by a delivery to a carrier not named by him, Lord Alvanley, C. J. ob-

served, "that it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for an injury done to the goods; and if any accident happen to the goods, it is at his risk." So, in the case of Godfrey *v.* Furze, (3 P. Wms. 185,) it was said by counsel in argument, and assented to by Lord Chancellor King, that if a tradesman in London send goods by order to a tradesman in the country, by a carrier not appointed by the country trader, if the carrier embezzles the goods, the trader in the country must stand to the loss. In the same manner, if goods are delivered to a carrier, or hoyman, to be delivered to A., and the goods are lost, A. can only bring the action, which shows the property to be in him. (Per Lord Hardwick, in Snee *v.* Prescott, 1 Atk. 248.) So, where goods were sent from Manchester to London by a carrier not appointed by the purchaser, but by the usual conveyance, the delivery to the carrier was decided to vest the property in the buyer, and from that instant the goods were at his risk. (Dutton *v.* Solomonson, 3 Bos. & Pul. 582.) In these cases, however, the seller may retain a controul over the goods by qualifying the delivery, as where goods delivered on board a vessel are expressed in the receipt given to the lighterman, to be for and on account of the shipper; this will give the holder of the receipt a controul over the goods until exchanged for the bill of lading. (Craven *v.* Ryder,

6 Taunt. 435.) And the master of the vessel, upon tender of such a receipt by the lighterman, is bound to sign it, and his refusal to do so will not impair the right of the seller. (Ruck *v.* Hatfield, 5 B. & A. 632. See Goodhart *v.* Lowe, 2 Jac. & Walk. 349.)

A delivery of goods to a wharfinger to be forwarded to the buyer, according to a previous course of dealing between the parties, does not constitute an acceptance within the statute of frauds. In the case of a delivery to an agent, who is merely authorized to receive the goods, and not to judge of their quantity and quality, so as to render the contract conclusive, the delivery will not satisfy the terms of the statute; for there can be no actual acceptance of the goods, so long as the buyer continues to have a right to object to them upon either of those points. (Hanson *v.* Armitage, 5 B. & A. 557. Vide Astey *v.* Emery, 4 M. & S. 262.)

Stoppage in transitu.

The vesting of the property in a buyer, upon a delivery of goods to a carrier on his account, prevails absolutely in all cases; but there is one instance in which a vendor is allowed to resume the possession: when goods have been sold, and not paid for, by reason of credit being given or otherwise, and the vendee to whom they have been consigned, becomes insolvent, the seller may seize the property at any time before they come into the possession of the buyer. This right, usually termed a stoppage in transitu, and originally adopted in the courts of Chancery, (Wiseman *v.* Vandeput, 2 Vern. 203. Snee *v.* Prescot, 1 Atk. 245. D'Aguila *v.* Lambert, Ambler, 399,) but now established and favourably received in courts of

law, (5 East 180,) is founded on principles of equity and natural justice, in order to indemnify the seller from the loss which he would otherwise sustain where the chance of payment is hopeless. (See Ellis *v.* Hunt, 3 T. R. 469. Lickbarrow *v.* Mason, 2 T. R. 75. S. C. 5 T. R. 683. 1 H. Bl. 357.) But a court of equity will not exercise this right on behalf of a purchaser; for where goods had been delivered on board a vessel on the vendor's account, for which payment was to be made at the time of the shipment, an injunction was refused, upon application for that purpose, to restrain the sailing of the vessel. (Vid. Goodhart *v.* Lowe, 2 Jac. & Walk. 349.) This right is not founded upon property, but necessarily supposes it to be in some other person, and not in him who sets it up. (Per Buller, J. in Lickbarrow *v.* Mason, 6 East, 24. n. *a.*) Nor does it proceed upon the ground of rescinding the contract, but is a kind of equitable lien, adopted by the law, for the purposes of substantial justice. (Per Lord Kenyon, in Hodgson *v.* Loy, 7 T. R. 445. 12 Ves. 382.) The law upon this subject may be considered with reference to—1. The cases in which, and the persons by whom the right may be exercised. 2. The continuance or determination of the transitus. 3. The means by which the right of the consignor may be taken away.

In what cases and by whom exercised.

With respect to the cases in which this right may be exercised, it may be observed, that it is not an unlimited power vested in the consignor, of varying the consignment at his pleasure, in all cases whatever, but is limited to the sole case of the insolvency of the

consignee. (The Constantia, 6 Rob. 421. Per Gibbs, C. J., 1 Marsh. 327.) Upon his bankruptcy, or becoming insolvent, goods consigned to him, and in the course of their journey, may be stopped in transitu; but if the right is exercised as a measure of precaution, upon a supposition of insolvency, which ultimately turns out to be unfounded, the rights of the consignee will not be affected. (The Constantia, ubi supra.)

The vendor, or the person standing in this relation to the bankrupt or insolvent consignee, is the proper person to exercise this right; for if he is merely a surety for the price of the goods, he is not entitled to stop them in transitu. In the case of Feise *v.* Wray, (3 East, 93,) the consignee, who had become bankrupt, gave orders to his correspondent at Hamburgh, to buy for him a quantity of goods, which he accordingly bought, upon his sole credit, of persons having no account or correspondence with the bankrupt, and shipped them on board a general ship, directed to the bankrupt, and the bill of lading was filled up to his order: the correspondent drew bills of exchange upon the bankrupt for the price of the goods, including a charge for the commission. The bills were not paid, and the consignee having become bankrupt before the arrival of the goods, the agent of the correspondent stopped them in transitu upon their arrival in England. In an action of trover against the agent, brought by the assignees of the bankrupt, to recover the value of the goods, Mr. Justice Lawrence in delivering his opinion, observed, "that it had been contended that the right of stopping in transitu does not attach between these parties; that the bankrupt must

be considered as the principal for whom the goods were originally purchased, and that the correspondent was no more than his factor or agent, purchasing them on his account; and that the right of stopping in transitu does, in point of law, apply solely to the case of vendor and vendee. If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here from their correspondents abroad, to purchase and ship certain merchandize to them: the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with, and they charge a commission to their correspondents abroad, upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But, at any rate, this is a case between vendor and vendee; for there was no privity in the original owner of the goods and the bankrupt; but the property may be considered as having been first purchased by a correspondent, and again sold to the bankrupt at the first price, with the addition of his commission upon it. He then became the vendor as to the bankrupt, and, consequently, had a right to stop the goods in transitu; and so it is admitted that he might in the argument, considering the correspondent as vendor, unless he is stopped by the circumstance of the bankrupt having accepted bills for the amount; which bills, it is contended, may be proved under the bankrupt's commission, and are equivalent at least to part payment of the goods; but it was decided in Hodgson *v.* Loy, (7 T. R. 440,)

that part payment for the goods does not conclude the right to stop in transitu; it only diminishes the vendor's lien *pro tanto* on the goods detained. Then, having lawfully possessed himself of them, he has a lien on them till the whole price is paid, which cannot therefore be satisfied by showing a part payment only. It is possible that part payment may be obtained by proving the bills under the bankrupt's commission; but if the loss must fall on one side or the other, the maxim applies, *Qui prior est tempore potior est jure.*" But a correspondent not concerned in the purchase of the goods, but who merely accepts bills on behalf of his principal, and receives a commission upon the amount, does not stand in the relation of vendor towards the principal, but is a mere surety for the price of the goods, and consequently not entitled to stop them in transitu. (Siffken and another *v.* Wray, 6 East, 371.)

The circumstance of the vendee having partly paid for the goods, does not destroy the vendor's right to stop them in transitu, upon the bankruptcy of the vendee, for the vendor has a right to retake them unless the whole price has been paid. The operation of a partial payment is merely to diminish the lien *pro tanto.* (Hodgson *v.* Loy, 7 T. R. 446. 3 East, 102.) So, goods consigned to a factor, who accepts bills upon the faith of the consignment, and pays part of the freight before it arrives, but becomes insolvent before the bills are due, may be stopped in transitu by the consignor, before they get into the actual possession of the factor. (Kinlock *v.* Craig, 3 T. R. 119.) The vendor's right, also, will not be defeated by the acts of persons who derive their claims from the con-

signee; as where the goods during their transitu are are attached by process out of the Mayor's Court, at the suit of the consignee's creditor, (Smith *v.* Goss, 1 Camp. 282,) or by a common carrier who claims to retain the goods as a lien for his general balance due to him from the consignee. (Butler *v.* Wolcott, 2 N. R. 64.) In these cases the right of the vendor is the elder and preferable lien.

A person who has a lien upon goods, and delivers them to a carrier on the account, and at the risk of the principal, cannot, in the event of his bankruptcy, stop the goods in transitu, for his lien ceases with the possession, and the delivery to the captain is equivalent to a delivery to the principal. (Sweet *v.* Pym, 1 East, 4.)

Continuation of transitus.

With respect to the continuance or determination of the transitus, much will depend upon the particular circumstances of the case; but it will be considered to be continuing until the goods come to the actual or constructive possession of the consignee. An actual possession of the goods, by a corporal seizure of them, was formerly holden to be requisite in order to exercise the right of stoppage in transitu. In the case of Hunter *v.* Beal, (cited 3 T. R. 466,) Lord Mansfield was of opinion that to deprive the vendor of his right, there must be an absolute and actual possession by the consignee, or, as his Lordship expresses it, they must have come to the corporal touch of the vendee. The expression, however, has been considered as too comprehensive, and of a figurative nature rarely if ever strictly true. (Per Lord Kenyon, C. J. in Wright *v.* Lawes, 4 Esp. N. P. C. 82. Per Lord Ellenborough, C. J. in Dixon *v.*

Baldwin, 5 East, 184. Ellis *v.* Hunt, 3 T. R. 468.) And latterly, when greater liberality has prevailed in the construction of this doctrine, and a disposition has been evinced of conferring in this respect a more enlarged benefit upon vendors, not only has the obtaining actual possession been dispensed with, but a constructive one, or even a notice given to the carrier, has been deemed a sufficient exercise of the right. (Litt *v.* Cowley, 2 Marsh. 459. Northey *v.* Field, 2 Esp. N. P. C. 613.) In the case of goods delivered to a carrier, whether by land or water, the transitus will be deemed to be continuing during the course of conveyance to their place of destination. (See Stokes *v.* La Riviere and cases infra.) And this principle will not be affected by a transference of goods to different carriers, for the purpose of forwarding them to their ultimate place of destination, as far as relates to the seller and the buyer or his agents. (Hodgson *v.* Loy, 7 T. R. 440. See Dixon *v.* Baldwin, 5 East, 185.)

A delivery on board a chartered ship does not preclude the right of the consignor to stop the goods in transitu while on board the same to the vendor, in the event of his insolvency before actual delivery, any more than if they had been delivered on board a general ship for the same person. (Bohtlingk *v.* Inglis, 3 East, 380.) See the case of Inglis *v.* Usherwood, (1 East, 515,) where a contrary doctrine was holden. But in the case of a vessel chartered by the consignees for three years, for which they were to find stock and provisions, and to pay the master, and have the entire disposition and complete control over the ship, during the period for which it was engaged, a

delivery on board the vessel was holden to be a delivery to the buyers. (Fowler *v.* M'Taggart, cited in 7 T. R. 442, 1 East, 522, and 3 East, 388.) So, where the plaintiff, a trader of London, in danger of insolvency, went to Glasgow, and obtained goods from a merchant there, and paid for them by a bill upon a house in London, which he knew to be insolvent; the goods were shipped at Leith, deliverable at the Glasgow wharf, London, and the receipt expressed them to be received *from the plaintiff*. The plaintiff having become bankrupt, the seller gave notice to the wharfinger in London, at whose wharf the goods had arrived, to hold them on his account, which he accordingly did. In an action of trover by the consignee against the wharfinger for the value of the goods, the court were of opinion that there was no pretence for stopping the goods in transitu, as the receipt showed that the delivery to the plaintiff was complete. (Noble *v.* Adams, 2 Marsh. 366.) But a delivery on board a vessel for and on account of the sellers, notwithstanding the captain refused to sign a receipt to that effect, and afterwards signed bills of lading to the order of the vendees, who had accepted a bill for the amount of the goods, will not destroy the vendor's right to stop them in transitu. In such a case it is the duty of the defendant to sign the receipt, and not to sign the bills of lading until the receipt is handed over to the buyer, and by him to the defendant. (Ruck *v.* Hatfield, 5 B. & A. 632.) But had the delivery on board the vessel to the vendee been complete, the transitus would have been at an end, (S. C., and see Goodhart *v.* Lowe, 2 Jac. & Walk. 349.)

In the case of Stokes *v.* La Riviere, cited in Bohtlingk *v.* Inglis, (3 East, 397. 3 T. R. 466. 5 East, 184,) Messrs. Duhem and Co. of Lisle, had purchased a quantity of goods of the plaintiff and other persons, which were delivered to the defendants for the purpose of being forwarded to Lisle. The defendants accordingly sent them to their correspondent at Ostend for that purpose, and upon receipt of the goods, he wrote to Messrs. Duhem and Co. apprising them of the circumstance. The Duhems having become bankrupt while the goods were at Ostend, the defendants, having considerable demands upon them, countermanded the orders which they had given to their correspondent, and subsequently obtained possession of the goods. In an action by the plaintiff to recover their value, it was contended on the part of the defendants, that immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhem, and that the defendants had a right to detain them. But Lord Mansfield, C. J. said, "no point is more clear, than that if goods are sold, and the price not paid, the seller may stop them in transitu; I mean in every sort of passage to the hands of the buyers. There have been an hundred cases of this sort. Ships in harbour, carriers, bills, have been stopped. In short, where the goods are in transitu, the seller has that proprietary lien. The goods are in the hands of the defendants to be conveyed: the owner may get them back again." (See Dixon *v.* Baldwin, 5 East, 185.) So, where a bale of cloth, which was sent by Messrs. Steers and Co. of Wakefield, to the defendant, who was an innkeeper, directed for the bankrupts; to whom the defendant's book-

keeper gave notice that a bale was arrived for them; and Steers and Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers and Co. The bankrupts gave orders for the defendant's book-keeper to send the bale down to the Galley Quay, in order to ship it on board the Union, to be carried to Boston. The defendant accordingly sent the bale to the quay, but arriving too late to be shipped, it was sent back to him. Within ten days afterwards a clerk of the bankrupts went to the defendant's warehouse, when the defendant asked what was to be done with the bale in question; and was ordered to keep it in his custody till another ship sailed, which would happen in a few days. The bankruptcy happened soon afterwards; and Messrs. Steers and Co. sent word to the defendant not to let the bale out of his hands: accordingly when the bankrupts applied for it, he refused to deliver it up. Lord Mansfield was clearly of opinion that, though the goods might be legally delivered to the vendees for many purposes, yet for *this* purpose there must be an absolute and actual possession by the bankrupts; or (as his Lordship expressed it) they must have come to the corporal touch of the vendees; otherwise they may be stopped in transitu, a delivery to a third person to convey to them is not sufficient. (Hunter *v.* Beal, cited 3 T. R. 466.) The authority of this case has, however, been much impaired by subsequent cases. (See Litt *v.* Cowley, 2 Marsh, 457.) And Lord Ellenborough, C. J. in commenting upon it, in Dixon *v.* Baldwin, (5 East, 184,) observes—"As to Hunter *v.* Beal, in which it is said

that the goods must come to the corporal touch of the vendee, in order to oust the right of stopping in transitu, it is a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch it actually comes, be an agent so far representing the principal, as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier, or mean of conveyance to or on the account of the principal, in a mere course of transit towards him. In Hunter *v.* Beal, I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee, i. e. when they had arrived at the innkeeper's, and were afterwards, under the immediate order of the vendee, thence actually launched again in a course of conveyance from him in their way to Boston; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete; and the transitus for this purpose cannot commence de novo, merely because the goods are again sent upon their travels towards a new and ulterior destination."

In the same manner, where a trader at North Taunton, in Devonshire, gave orders to the plaintiff to send him a quantity of goods from London, not directing that they should be sent by any particular vessel, but simply that they should be sent to Exeter, to be forwarded to him at North Taunton; they were accordingly shipped, arrived at Exeter, and were put

into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of the consignee, as the person to whom they were directed, and he was considered as the wharfinger's paymaster. In this state of things the plaintiffs received a letter from the consignee, informing them that his situation was such that he could not receive the goods, and offered to them that they might take them back, if they thought proper. The plaintiffs immediately, on the receipt of this letter, sent to the wharfinger, and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them till he could do so with safety, notwithstanding which he afterwards delivered them to the assignees of the consignee. Under these circumstances the question was, whether the goods in the hands of the wharfinger were in such a situation that the vendors could not stop them? The court decided that they were; for although there was no corporal touch, yet that took place which was equivalent to it. The plaintiffs gave notice to the wharfinger, and demanded the goods as their property; and the defendant undertook not to deliver them till he was certain of a safe delivery. (Mills *v.* Ball, 2 Bos. & Pul. 457.) So where the plaintiff received an order for a quantity of goods which were sent, according to the buyer's directions to the defendant, who was a wharfinger, for the purpose of being forwarded to the consignee; the goods in the defendant's possession were considered merely as at a stage upon their transit, and the consignor was accordingly held entitled to stop them in transitu. (Smith *v.* Goss, 1 Camp. 282.)

In the same manner, where A. agreed to buy some articles of plate of B. who was to get A.'s arms engraved on them; a delivery for that purpose to the engraver usually employed by B. to whom the plate was to be brought back by the directions of both parties, and the engraving paid for by him, was holden not to be a delivery to A. so as to defeat B.'s right of stopping the goods in transitu, upon failure to pay the price of the goods. (Owenson *v.* Morse, 7 T. R. 64.) So where goods have been sent by orders from the vendee to the packer, who was considered as a middle-man between the vendor and vendee, the court held, that the goods might be stopped in transitu, on the bankruptcy of the vendee. (Hirst *v.* Ware, cited 3 T. R. 467. See Dixon *v.* Baldwin, 5 East, 185. and cases infra.)

The arrival of a ship at her port of destination, and the taking actual possession of her by the consignee, will not deprive the vendor of his right to take possession of the property, where certain acts are to be done before the vessel can be unloaded. In a case where a vessel, upon her arrival in port, was taken possession of by the assignee of the buyer, who had become bankrupt, but was ordered back to perform quarantine, and the vendor claimed the goods before the quarantine was completed, his resumption of the property was holden to be legal. The taking possession, in order to devest the vendors of their right, must take place at the termination of the voyage, which is not complete, until the vessel has performed quarantine; and the consignee cannot anticipate this event by going out to meet the vessel. (Holst *v.* Pownal, 1 Esp. N. P. C. 240.) So, where the person

to whom the goods were consigned, became bankrupt after the ship arrived, but before the time for the payment of the duties expired, the goods, during this period being retained on board, and afterwards removed to the king's cellar, the consignor, before the sale usually made in order to defray the duties, applied for the goods without success, but having received the proceeds of the sale, the assignee of the buyer brought an action to recover the amount, contending, that the property was devested out of the consignor by the goods coming to the bankrupt. But Lord Kenyon, C. J. was of opinion, that the plaintiff was not entitled to recover. His lordship observed, that the court had of late years much inclined in favour of the consignor's power to stop goods in transitu; that the rule laid down by Lord Hardwicke, of the necessity of actual possession, in order to secure the right, was much relaxed, and that he subscribed to the rule, that a claim was sufficient. In this case, until the duties were paid, the goods were *quasi in custodia legis*, and the claim by the consignor's agent, before the sale, was a sufficient stoppage in transitu. (Northey *v.* Field, 2 Esp. N. P. C. 613.) So, where goods were delivered to a carrier, to be conveyed to the buyer, and the seller, while they were in transitu, gave notice not to deliver them, but, by the mistake of the carrier, they were delivered to the buyer, who disposed of part of them, and soon after became bankrupt, the court held, that the delivery was incomplete, and that trover might be maintained against the assignees, for the delivery by mistake conveyed no property to the bankrupt; and that the notice devested the purchaser of the property, and revested it in the seller. (Litt *v.* Cowley, 2 Marsh. 457. 7 Taunt. 169.)

Determination of the transitus.

The preceding cases show the particular circumstances which have been decided to estabish a continuance of the transitus. With respect to its determination, it may be observed, that it is terminated by an actual or constructive delivery of the goods, on their arrival at the ultimate place of their destination. The following cases will show the grounds upon which the courts have proceeded in this branch of the subject.

A delivery of part of the goods sold by an entire contract will be considered to be a delivery of the whole, there appearing no intention either previous to, or at the time of, the delivery, to separate part of the cargo from the rest. (Slubey *v.* Hayward and others, 2 H. Bl. 504. 12 Ves. 381.) As when A. at a foreign port, ships goods by the order and on the account of B. to be paid for at a future day, and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to B. who, before the arrival of the ship at the place of destination, sells the goods, and endorses the bill of lading to C. After the arrival of the ship, and a delivery of part of the goods to the agent of C., B. becomes bankrupt without having paid A. the price of the goods. By this delivery the transitus is at an end, as to the whole of the goods. (Slubey *v.* Heyward, 2 H. Bl. 504.) So, where a number of bales of bacon, then lying at the wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt; whereupon the vendor, with-

in ten days of the time of sale, ordered the wharfinger not to deliver the remainder. By the custom of trade, the charges of warehousing were to be paid by the vendor fourteen hours after the sale. The court held that the vendee had taken possession of the whole, and that the vendor had no right to stop what remained in the hands of the wharfinger. (Hammond *v.* Anderson, 1 N. R. 69. See Hanson *v.* Meyer, 6 East, 614. Rugg *v.* Minett, 11 East, 210. Zagury *v.* Furnel, 2 Camp. 240. Hinde *v.* Whitehouse, 7 East, 558. Stoveld *v.* Hughes, 14 East, 308.)

An actual transfer of the goods is not necessary to constitute such a delivery as will vest in the buyer an uncontrollable right to the property. If the goods at the time of the sale are in the vendor's warehouse, and he receives warehouse rent for them, this will be a complete transfer of the property, and extinguish the right of stoppage in transitu. The payment of rent for a part of the warehouse, so far appropriates that portion to the use of the buyer as to make the delivery similar to the one at his own warehouse. (Hurry *v.* Mangles, 1 Camp. N. P. C. 452.) And where the defendants sold a quantity of timber then lying at their own wharf to J. S. for bills payable at a future day, and at the time of sale J. S. put his mark upon the timber, a small part of which was forwarded by the defendants to one place, and part to another, and then J. S. before the time of payment arrived, sold the whole to the plaintiffs. They notified the sale to the defendants, who answered that it was very well, and afterwards, in their presence, the plaintiffs put their mark upon the whole of the timber

lying at the defendant's wharf. The defendants' assent to the sale, and the marking of the timber by the plaintiffs, were holden to constitute an executed delivery to the plaintiffs, and consequent termination of the transitus, which deprived the defendant of all right to stop the goods in transitu. (Stoveld *v.* Hughes, 14 East, 308.) So, where the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them in transitu is gone, and the wharfinger is bound to hold them as the agent of the purchaser. From the moment of the transfer there is an executed delivery of the goods, as much as if they had been delivered into the vendee's hands. (Harman *v.* Anderson, 2 Camp. 243.) And the same effect is produced by the delivery note being lodged with the wharfinger without a transfer in his books. (S. C. and see S. P. per Gibbs, C. J. in Withers *v.* Lyss, 4 Camp. 240.) So, where goods are entered in the books of the West India Dock Company, in the name of A., who receives the usual checque for them, which, having sold the goods to B., he endorses and delivers to him: B. sells the goods and delivers the checque to C. on credit. On C.'s insolvency, A. cannot lawfully take possession of the goods, although they have continued to stand in his name, and the checque has not been lodged with the dock-company. (Spear *v.* Travers, 4 Camp. 251.)

But when something remains to be previously done before the delivery can take place, the delivery of the order to the warehouseman will not have that effect.

A particular parcel of goods in the possession of a warehouseman, is sold at so much the cwt., the weight of the whole being uncertain, to be paid by a bill of exchange. The vendor gives the purchaser an order to weigh and deliver the goods, which was lodged with the warehouseman: but before the goods are weighed the purchaser becomes insolvent. The vendor has a right to stop them in transitu. (Withers *v.* Lyss, 4 Camp. 237.) The necessity for the performance of some previous act, as the weighing in this instance, has in several cases been considered sufficient to countervail the effect of the delivery of an order to a warehouseman, and an entry in his books, and to entitle the seller, upon the insolvency of the vendee, to countermand the delivery. (Busk *v.* Davis, 2 M. & Selw. 397. Shepley *v.* Davis, 1 Marsh. 252.)

The termination of the transitus will be considered to be complete upon the arrival of the goods at the place of their ultimate destination as between the buyer and the seller, and although they have not arrived at the residence of the consignee, yet in certain cases where he has taken possession of them, and exercised acts of ownership, it will be sufficient.

In the case of Ellis *v.* Hunt, 3 T. R. 464,) the consignee had ordered a quantity of files of the plaintiffs, who were manufacturers at Sheffield, which were packed in a cask and sent directed to the consignee. The plaintiffs drew a bill on the consignee for the value of the goods, which was never paid. Immediately upon the arrival of the goods they were attached at the suit of certain creditors of the consignee, by process of foreign attachment out of the Mayor's Court of London, and the cask remained at the inn,

charged with such attachment, so far as the same could charge it. Before, however, the goods arrived, the consignee became bankrupt, and the provisional assignee demanded possession of the goods from the carrier, and put his mark upon the cask, but did not take them away. The consignors hearing of the bankruptcy of the consignee, afterwards demanded the cask of the carrier, and upon his delivering them up to the assignees, the attachment being withdrawn, they brought an action of trover against him to recover the value of the files. The court, however, decided that the goods were not in transitu at the time the plaintiffs wrote to countermand the delivery of them; before that the assignee had put his mark upon the cask, which was considered as taking actual possession. When the goods were marked, they were delivered to the consignee as far as the circumstances of the case would permit; they could not then take them away, because they were at that time under an attachment. After the mark was put on them, they were no longer in transitu; and consequently the plaintiffs' right to seize them was devested. So, where a quantity of goods were ordered of the defendants at Manchester, to be forwarded to the bankrupt's agent at Hull, for the purpose of being shipped to the correspondents of the bankrupt at Hamburg: when the goods arrived at Hull, they were absolutely at the bankrupt's disposal, and the agent received orders from him as to their ulterior destination. Under these circumstances the transitus was holden to be complete upon the arrival of the goods at the agent's at Hull, since that was their ultimate place of destination, as between the bankrupt and the defen-

dants; for, until the agent received directions from the bankrupt, he did not know where to send the goods. (Dixon *v.* Baldwen, 5 East, 175.) So, where the plaintiff, who was a manufacturer at Norwich, agreed with one Shevill for the purchase of several pipes of wine; Shevill wrote to Farquharson, his correspondent in London, to execute the order, who bought the wine of Bamford & Co. and consigned it to the plaintiff by a vessel employed in the course of trade between Yarmouth and London. When the goods arrived at Yarmouth, the plaintiff's agent took possession of them, but not having room in his own cellar, they were removed into the defendant's, who was paid warehouse room by the plaintiff. Two days afterwards the plaintiff came to Yarmouth, tasted the wines, and took samples of them, but Bamford & Co. discovering Farquharson to be a swindler, and a man of no property, they stopped the goods, and obtained possession of them by giving the defendant an indemnity. On the part of the defendants it was contended, that the transitus must be deemed to be continuing until the goods reached the plaintiff's residence at Norwich, and was not complete by the delivery at Yarmouth. Lord Kenyon, C. J., however, was of opinion that there was no ground for considering the goods in transitu, and that the delivery to the plaintiff's agent at Yarmouth, according to the bill of lading, was a sufficient delivery to support an action against the plaintiff for goods sold and delivered. His Lordship observed, "I once said, that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal

touch was necessary to confer a property on the consignee, it had taken place; but all that is necessary is, that the consignee exercise some act of ownership on the property consigned to him; and he has done so here: he has paid for the warehouse room; he has tasted and taken sample of the wines." (Wright *v.* Lawes, 4 Esp. N. P. C. 82. See Mills *v.* Ball, 4 Bos. & Pul. 457.)

A delivery to a packer or wharfinger for the purpose of forwarding the goods to the consignee in cases where he may be considered as a middle man, will not deprive the consignor of the right of stopping the goods in transitu, but where the consignee has no warehouse of his own, and uses the warehouse of the packer or wharfinger for that purpose, the transitus will be considered to be determined upon the arrival of the goods at such warehouse.

In the case of Leeds and another *v.* Wright, (3 Bos. & Pul. 320,) it appeared that the goods in question were purchased of the plaintiffs at Manchester, by one Moisseron (who was the general agent in London of the house of Le Grand and Co. of Paris) in the name of that house; that by Moisseron's directions they were sent for him to the house of the defendant in London, who was a packer, and arrived there on the 3d of September; that upon their arrival there, Moisseron came to the defendant's house, and had some of the goods unpacked and sent away, and the remainder repacked; that on the 7th of September, while the goods so repacked remained in the house of the defendant, news arrived that the house of Le Grand and Co. at Paris, had failed; upon which the plaintiffs tendered to the defendant his charges

upon the goods, and required that they should be delivered up to them. It also appeared that Moisseron had a general power, either to send the goods to Le Grand and Co. at Paris, or to Holland, Germany, or such other market as he should think most beneficial. The delivery, under these circumstances, not on the account of Le Grand and Co., but on that of Moisseron, was holden to be a delivery to the latter, and that consequently the plaintiffs had no right to stop them in transitu. (See Dixon *v.* Baldwen, 5 East, 186.) So, where the goods in question had been ordered by the bankrupt, who was a merchant in London, of persons resident at Manchester, and were sent directed to him at the inn in London. Upon the arrival of the goods, they were sent to the defendant's house, who was a packer, not in consequence of any order respecting those particular goods, but in consequence of a general order from the bankrupt to send all goods directed to him to the defendant's house. On the 11th of March, the bankrupt, who lived in lodgings, and had no warehouse of his own, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the defendant's house, they were booked for the account of the bankrupt; and the defendant, not knowing that the bankrupt had then absconded, and not having any directions respecting the goods, caused them to be unpacked, with a view to ascertain of what they consisted. On the 31st of March, the consignors having learned the situation of the bankrupt's affairs, claimed the goods from the defendant, and on the day after they were demanded by the assignees. The defendants, being indemnified by the consignors, refused to deliver the

goods to the plaintiffs. Lord Alvanley, C. J., recognising the opinion of Chambre, J., in Richardson *v.* Goss, (3 Bos. & Pul. 127,) that if a person be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, the transitus will be at an end when the goods arrive at such warehouse, decided, in concurrence with the other judges, that the plaintiffs were not entitled to stop the goods in transitu, since, if the delivery at the warehouse of the packer were not to be considered as the place of delivery to the bankrupt, there could be no delivery at all. (Scott *v.* Pettit, 3 Bos. & Pul. 469. See 3 East, 185,) where these cases are recognised by Lord Ellenborough, C. J., delivering the judgment of the court. So, where a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the continent soon after their arrival in London; but not having any ware house of his own, they usually remained at the wagon office of the defendant, who was a common carrier, until they were taken away for the purpose of being shipped. The goods in question were consigned from Manchester for the purpose of exportation, and upon their arrival at the defendant's wagon office, the consignee's clerk called and gave directions respecting them. Afterwards, the agent of the consignor gave notice to the defendant not to deliver the goods to the assignee of the consignee, and the defendant subsequently delivered them to the consignor's agent. In an action by the assignee of the consignee for the value of the goods, the court, relying on the above decisions of Leeds *v.* Wright, and Scott *v.* Pettit, decided that the transi-

tus was at an end upon the arrival of the goods at the defendant's wagon office. (Rowe *v.* Pickford, 8 Taunt. 83. See Loeschman *v.* Williams, 4 Camp. 181.)(*a*)

In what cases the right is taken away.

The right of stoppage in transitu must not only be exercised before the goods come to the possession of the consignee, but before the rights of third persons have intervened by a bona fide endorsement of the bill of lading. Where the goods are deliverable to the order of the consignee, an endorsement of the bill of lading for a valuable consideration bona fide, without notice by the endorsee of such circumstances, as would render the bill of lading not fairly and honestly assignable, will deprive the vendor of this right. (Lickbarrow *v.* Mason, 2 T. R. 63. 1 H. Bl. 357.) See the learned opinion of Mr. Justice Buller, delivered in the House of Lords, (6 East, 21. n. 9 East, 516. Haille *v.* Smith, 1 Bos. & Pul. 563. Coxe *v.* Lumsden, Peake N. P. C. 189.) A contrary rule would enable the consignee to commit a fraud upon an innocent third person, by means of the bill of lading, which makes him ostensible owner of the property. (See Solomons *v.* Nissen, 2 T. R. 680.) The legal title of the endorsee, however, may be impeached on the ground of fraud or collusion. (Wright *v.* Campbell, 4 Burr. 2046. 1 Bl. Rep. 628. Solomons *v.* Nissen, 2 T. R. 674.) And where the bill of lading

(*a*) If goods are shipped on credit, in a foreign port, on board the consignee's own ship, the master of which signs a bill of lading, by which they are to be delivered to his owner, the transitus is at an end by delivery to the master; and the consignor cannot afterwards stop the goods, in case of the insolvency of the consignee before their arrival. (Bolin *v.* Huffnagle, 1 Rawle, 1. See, however, Stubbs *v.* Lund, 7 Mass. R. 453. Ilsley *v.* Stubbs, 9 Mass. R. 65. Scholfield *v.* Bell, 14 Mass. R. 40.)

was assigned over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by an agreement between him and the consignee, by which it appeared that the consignor had not been paid for them, and that they were to become partners in the goods, the endorsement under such circumstances was holden not sufficient to destroy the vendor's right. (Solomons *v.* Nissen, 2 T. R. 674.) So, an endorsement for a valuable consideration to a third person, with notice of the insolvency of the consignee, will not deprive the consignor of the right. (Virtue *v.* Jewell, 4 Camp. 31.) But the mere knowledge that the goods have not been paid for in money, but by bills of exchange accepted by the consignee payable at a future day, not then arrived, is not of itself a sufficient ground to impeach the endorsee's title. (Cummins *v.* Brown, 9 East, 506. See Coxe *v.* Harden, 4 East, 211. Ogle *v.* Atkinson, 1 Marsh, 328.) As a factor cannot pledge the goods of his principal by a delivery of the goods themselves, so neither can he do so by an endorsement and delivery of the bill of lading, and consequently the right of the principal to stop them in transitu will not be affected by such a transfer. (Newsom *v.* Thornton, 6 East, 17.)

A receipt for the delivery of goods on board a vessel, acknowledging them to be received for and on account of the sellers, will preserve their right over the goods, and if the captain improperly sign a bill of lading to the buyer, who again sells, and receives payment for them, the original seller will be entitled to stop the goods in transitu while in the captain's possession; for, retaining the lighterman's receipt,

they had never parted with their control over the property. (Craven *v.* Ryder, 6 Taunt. 434.) So, where the consignor shipped a quantity of barley on his own account, on board the defendant's vessels, and endorsed the bill of lading to his factor in London, to whom at that time he was indebted upon the balance of accounts including bills which were then running, but not afterwards paid, to a greater amount than the value of the barley; the factor afterwards endorsed the bill to a person whom he was legally indebted to, and who was aware of the factor's insolvency at the time of the endorsement. In this case, the right of the consignor to stop the goods in transitu, was holden not to exist, as the factor was to be considered the purchaser of the goods for a valuable consideration, and therefore the endorsement of a bill of lading to the factor under the above circumstances, vested the property absolutely in him, unaffected by the subsequent non-payment of the bills. (Virtue *v.* Jewell, 4 Camp. 31.)

The endorsement of the bill of lading is not absolutely necessary for the purpose of devesting the consignor of his right; particular circumstances may exist which will be equivalent to such endorsement, and destroy the right of stoppage in transitu.

A merchant in Ireland, having shipped for London a quantity of provisions, on board the defendant's vessel, sent the bill of lading to his factor at that place, not endorsed, but with their names written on the back. The factors having effected an insurance according to their instructions, wrote to their principal for an endorsement of the bill of lading, who replied in answer, that if the bill was not endorsed, that it was a

mistake, and that they would send an endorsement. The consignor had drawn bills of exchange upon the factor, which upon his not being able to pay, were taken up by the plaintiff, for the honour of the consignor, who was largely indebted to him in other respects. The plaintiff having knowledge of the above circumstances, obtained from the consignor an endorsement of the bill of lading, and demanded possession of the goods from the defendant. But Lord Kenyon decided, that the plaintiff had no right to take the goods out of the possession of the persons to whom the factor had transferred them, and that though between persons ignorant of the transaction, an endorsement is the only transfer; yet where the parties know the whole of the circumstances, a letter of the above kind is a sufficient transfer of the property. (Dick *v.* Lumsden, Peake, N. P. C. 189. See Nix *v.* Olive, before Lord Ellenborough, C. J. after T. T. 1805. Abbott on Shipping, 403.) So if the purchaser of goods, to be paid for by bill, after giving his acceptance during the time of credit, and while the goods are in transitu, sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the gods in transitu is taken away. (Davis *v.* Reynolds, 4 Camp. 267.)

Remedies against a carrier

The ordinary remedies against a carrier, for the loss or injury of goods, are an action of assumpsit, or upon the case; and where the carrier has been guilty of a misfeasance, which amounts to a conversion, an action of trover is maintainable. The two former of these actions are of similar application, and by varying the mode of considering the injury, either

as the non-performance of a contract, or as a breach of duty, are in general applicable to the same cause of action. But very different consequences result from the adoption of the one or the other, both in the form of the pleadings, and the nature of the evidence.

Assumpsit. The action of assumpsit is an established mode of declaring, and is in effect the same as a declaration upon the custom of the realm. (Dale *v.* Hall, 1 Wils. 281.) In adopting this course, and considering the transaction as constituting a contract between the parties, the general principles which govern that form of action, become applicable; and as incident thereto, the plaintiff has the advantage of joining the common counts, if he has other causes of action to which they are applicable. On the other hand, the plaintiff is bound to sue all the parties, who are jointly liable, or the defendant may plead in abatement. (Govett *v.* Radnidge, 3 East, 62. 1 Wms.' Saund. 291. b. n. 4.) and must prove at the trial a joint liability in all the persons whom he has sued, or advantage may be taken of that omission under the general issue; for the contract must be proved as stated, and the proof of a contract with A. and B. will not support a contract stated to be made with A. B. and C. (See Wilsford *v.* Wood, 1 Esp. N. P. C. 182. 1 Wms.' Saund. 291. b. n. 4. Max *v.* Roberts, 2 N. R. 454.) In this form the plaintiff will also be precluded from joining a count in trover. Assumpsit is maintainable when the cause of action consists in a misfeasance, as where the carrier, instead of conveying the parcel according to his engagement, transfers it to another carrier for that purpose, whereby it is lost. (Sleat *v.* Fagg, 5 B. & A. 349.)

Many of the disadvantages under which the plaintiff labours, by bringing an action of assumpsit, are avoided by adopting an action upon the case, and some advantages are also obtained which are peculiar to an action arising ex delicto. By bringing an action upon the case, a count in trover may be added, where that form is applicable. The defendant will be ousted of his plea in abatement on the ground of not joining all the parties; and where there are several defendants the plaintiff will be entitled to a verdict, if some are found guilty, although others are acquitted. Case.

With respect, however, to an action upon the case, when founded substantially upon a contract, much diversity of opinion has prevailed as to the real nature of the action, whether it is to be considered as an action ex delicto, and to be governed by the rules which regulate that form of action, or quasi ex contractu, and subject to the same rules as an action of assumpsit, or other action founded upon a contract. (See Powell *v.* Layton, 2 N. R. 365. Weal *v.* King, 12 East, 452, and cases infra.)

In an action upon the case, against two of four joint owners of a vessel, for a breach of duty in the carriage of goods, which the defendants had undertaken to carry for a reasonable freight to be therefore paid, the court were of opinion that this was not an action ex delicto, but quasi ex contractu, and gave judgment for the defendant, because all the owners were not joined. (Boson *v.* Sandford, Skinn. 278. 3 Mod. 321. Carth. 58. 3 Lev. 258. Salk. 440. 1 Show. 29. 101. 2 Show. 478. S. C.) The form of action adopted in this case, whether in case or as-

sumpsit, has been differently represented upon different occasions, (see Buddle *v.* Wilson, 6 T. R. 369. Govett *v.* Radnidge, 3 East, 69,) and its authority has been impeached upon the ground that the judges by whom it was determined, went upon a false assumption; that the non-joinder of other parties who were liable, could not be pleaded in abatement. (Per De Grey, C. J. in Abbott *v.* Smith, 2 Bl. 947. Govett *v.* Radnidge, supra,) but is supported in the case of Powell *v.* Layton, (2 N. R. 372.) So, in the last mentioned case of Powell *v.* Layton, which was an action against one of several joint owners of a ship, for a breach of duty, in not delivering goods which they had accepted to carry for a reward, the declaration was decided to be founded on contract, and the defendant might plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners were not sued. And in a subsequent case, where the action was brought against nine defendants, joint owners of the vessel, on board of which the goods had been delivered, consigned to the plaintiff, the declaration alleged a delivery of the goods to be carried for freight, and a breach of duty in making a deviation during the course of the voyage, by which the plaintiff lost the benefit of a policy of insurance. It appeared in evidence, by the ship's register, that only eight of the defendants were owners, and that one of them had afterwards married the ninth. A verdict having been found for the plaintiff, the court made a rule absolute for entering a nonsuit, upon the ground that the action was founded in contract, and that the plaintiff was not entitled to re-

cover, because he had not proved all the defendants to be liable. (Max *v.* Roberts, 2 N. R. 454. 12 East, 89. S. C.) But in an action against three defendants, wherein the plaintiff declared that they had the loading of a certain hogshead of treacle, for a reasonable reward, to be therefore paid to two of them, and a certain other reward to the other, and that the defendants so negligently conducted themselves that the hogshead was lost, a verdict having been found for two of the defendants, and against the other, it was insisted upon motion in arrest of judgment, that the cause of action being founded in contract, or arising at least quasi ex contractu, the finding of not guilty as to two of the defendants, negatived the existence of a joint contract, which must be proved, if the action were founded in contract, and that the plaintiff was not entitled to judgment upon the record. But the court, upon the authority of the case of Dickon *v.* Clifton. (4 Wils. 319,) which contained a similar count, and was joined with a count in trover, overruled the objection. "What inconvenience is there," observes Lord Ellenborough, C. J. in delivering the judgment of the court, "in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise, implied from the same consideration of hire? By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of the case

requires, frames his principal count in such a manner, as either to join a count in trover therewith, if he have another cause of action for the consideration of the court, other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable." (Govett *v.* Radnidge, 3 East, 69. See Cowper *v.* South, 4 Taunt. 802.)

And in a late case, in which the declaration was framed upon a neglect of duty, and not for a breach of an undertaking, the action was brought against ten defendants, who were the proprietors of a stage coach, in which the plaintiff had been a passenger, and was injured by the upsetting of the coach, through the negligence of the defendant's driver. A verdict having been found agains teight of the defendants, and in favour of the other two, a writ of Error was brought into the Exchequer Chamber. On behalf of the plaintiffs in error, it was contended, upon the authority of the cases of Powell v. Layton, (2 N. R. 365,) Weal *v.* King, (12 East, 452,) Green *v.* Greenbank, (2 Marsh, 485,) Boson *v.* Sandford, (supra, 89,) and Dale *v.* Hall, (1 Wils. 281,) that the cause of action being founded substantially upon a contract, was subject to all the incidents of an action upon a contract, and that, consequently, the plaintiff was bound to prove a joint liability in all the defendants. But the court considering that the action was founded upon a misfeasance, and the declaration framed accordingly, decided that the verdict and judgment against some of the defendants was not erroneous, and affirmed the judgment of the Court of King's Bench. (Brotherton *v.* Wood, 3 Bro. & B. 54.

S. C. in Exchequer, 9 Price, 408. See 3 Bro. & Bing. 174.)

In an action of trespass on the case against a common carrier, if it appear by a bill of exceptions, that the defendant *fraudulently* opened certain packages and casks being in his care, and belonging to the plaintiff, took therefrom a part of the contents, and converted the same to his own use, but not that the said contents were *feloniously* carried away, such offence is considered as amounting to a trespass only. (Cook *v.* Darby, 4 Munf. Rep. 444.)

Where the action is framed in case for a breach of duty, and not in terms of contract, a count in trover may be joined. In the case of Dickon *v.* Clifton, (2 Wils. 319,) where the action was framed in this way, for negligence and misfeasance, with which a count in trover was joined, an objection was made upon motion in arrest of judgment, that these counts could not be joined, but was overruled by the court. Lord Chief Justice Wilmot observed, "I own that in many books it is reported, that trover, and a count against a common carrier, cannot be joined, but common experience and practice is now to the contrary;" and Lord Ellenborough, C. J. in Govett *v.* Radnidge, (3 East, 69,) recognising this observation, added, "that when the counts were framed in this manner, it was then the daily, and well warranted practice to join them." Trover.

To sustain this count, a conversion, which is an essential ingredient to the maintenance of this form of action, must be proved; it may, therefore be useful to observe the nature of this act, and its qualities. A conversion is a misfeasance, consisting in the com-

mission of a tortious act, and may be defined to be the wrongful assumption of the right of ownership over property, to the prejudice of the true owner. (Ross *v.* Johnson, 5 Burr. 2826. M'Combie *v.* Davies, 6 East, 540. Bromley *v.* Coxwell, 2 Bos. & Pul. 439. Bristol *v.* Burt, 7 Johns. R. 254. Murray *v.* Burling, 10 Johns. R. 172.) Where the act relied upon decidedly indicates this assumption of ownership, it will of itself amount to a conversion. Thus, where one person assumes to himself the property and right of disposing of another man's goods, (per Holt, C. J. in Baldwin *v.* Cole, 6 Mod. 212, recognised by Lord Ellenborough, C. J. in M'Combie *v.* Davies, 6 East, 540,) as by the actual destruction of property, (per Abbott, C. J. in Keyworth *v.* Hill, 3 B.& A. 687,) or obtaining possession of it by compulsion, under a void legal process. (Summersett *v.* Jarvis, 3 Bro. & B. 2.) So, taking property by assignment, from one who has no authority to transfer it, as when a factor without authority pledges goods with which he is entrusted to sell. (M'Combie *v.* Davies, 6 East, 540,) or goods are sold by a person having no authority to dispose of them, and this will be a conversion, both in the seller and the buyer, unless he has purchased the goods in market overt bona fide, and without the knowledge of imperfection in the seller's title. (Freeman *v.* East India Company, 1 Dowling & Ryl. 234.) To apply these general principles to our present subject, it has been holden, in the case of a carrier, that if he draw out part of the vessel and fill it up with water, it is a conversion of all the liquor. (Richardson *v.* Atkinson, 1 Str. 576.) So, trover will lie against a carrier who delivers goods by mistake to a

wrong person; for by such delivery he becomes an actor, and is guilty of a conversion, so as to support this action. (Youl *v.* Harbottle, Peake's N. P. C. 49, cited by Bailey, J. in Deveraux *v.* Barclay, 2 B. & A. 704. See Ross *v.* Johnson, 5 Burr. 2827; Townsend *v.* Inglis, Holt, N. P. C. 278.) But where the act is not of itself of so decisive a character, other circumstances become requisite to show a conversion, and, for this purpose, a demand and refusal are usually relied upon to make the act complete. The mere non-delivery of goods will not constitute a conversion on the part of the carrier, but, if he has them in his possession, and, upon demand, refuse to deliver them, this will be evidence of a conversion. (Salk. 655. Youl *v.* Harbottle, Peake, N. P. C. 50. 1 Camp. 410.) So, where a man, entrusted with the goods of another, puts them into the hands of a third person, without orders, and thereby brings a charge upon his employer, it is a conversion; as, where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under an idea that the wharfinger had a lien upon them for the wharfage fees, because the vessel was unloaded against the wharf; it was held, that the owner, on demand and refusal, might maintain trover against the captain, unless he could establish the wharfinger's right; for putting the goods in the custody of the wharfinger brings a charge upon the plaintiff, and is therefore a conversion by the defendant. (Syeds *v.* Hay, 4 T. R. 260. See Smith *v.* Young, 1 Camp. 439.)

But a demand and refusal is merely evidence of a conversion, and will not have that effect where it appears no conversion has taken place, as in the case of a carrier or wharfinger, where the goods are proved to have been lost through negligence or stolen; and therefore trover does not lie in such case, though the owner may have an action upon the case. (Owen *v.* Lewyn, 1 Vent. 233. Anon. 2 Salk. 655. Ross *v.* Johnson, 5 Burr. 2825. Buller, N. P. 44, 45. Youl *v.* Harbottle, Peake's N. P. C. 49.) So, if A. send goods by B. a common carrier, to be delivered to C.; proof that B. asserted he had delivered the goods to C., whereas in truth C. had never received them, is not sufficient evidence of conversion, to support trover against B. (Attersol *v.* Briant, 1 Camp. 409.)

Parties to the action.

The person invested with the legal right to property, is the proper party to sue in a court of justice for an injury to it; and since a delivery to a carrier, to the order of the buyer, vests the property in him immediately and absolutely, he is the person who has sustained the loss, if any, by the negligence of the carrier, and is consequently the fit person to call for compensation from the person by whom he has been injured. (Dawes *v.* Peck, 8 T. R. 332. Brown *v.* Hodgson, 2 Camp. 36.)

In an action brought by the consignor in the case of goods delivered on board a vessel, to be carried from London to Toningen, which were expressed in the bill of lading to be shipped by order and on account of Hesse & Co. of Hamburgh; upon an objection to the plaintiff's right to sue, Lord Ellenborough, C. J. observed, "The goods are shipped by order and on account of Hesse & Co. I can recognise no pro-

perty but that recognised by the bill of lading. This action cannot be maintained." (Brown *v.* Hodgson, 2 Camp. 36. See Sargent *v.* Morris, 3 B. & A. 278. Dawes *v.* Peck, 8 T. R. 330. Joseph *v.* Knox, 3 Camp. 320. Noble *v.* Adams, 2 Marsh. 366. 7 Taunt. 59. Griffith *v.* Ingledew, 6 Serg. & R. 429.) An action in the name of the consignor has been maintained in some cases, upon the ground that he was liable for the price of the carriage. (Davies *v.* James, 5 Burr. 2680. Moore *v.* Wilson, 1 T. R. 659.) But these cases proceeded on the ground of special agreements between the respective consignors and consignees, and do not affect the general principle. (Dawes *v.* Peck, 8 T. R. 330. King *v.* Meredith, 2 Camp. N. P. C. 639.)

There are cases, however, in which the consignee may maintain an action against a carrier; as, where a counterfeited order in the name of a third person is fraudulently given to a tradesman, who in consequence delivers the goods to the carrier, directed to the supposed consignee, which are afterwards lost by the carrier, by means of a negligent mis-delivery. In this case the consignee may sue in his own name, since the delivery of the goods to the carrier created no change of property; for there was no sale between the parties which could have transferred it to the consignee, and the delivery being by fraud, could operate no such effect. (Per Richardson, J. in Duff *v.* Budd, 3 Bro. & Bing. 184. Vide Birkett *v.* Willan, 2 B. & A. 356.)

Whether the loss or damage arises from the negligence of the carrier, or of his servants, the action should be brought against the carrier. If the driver of a stage-coach, although in fraud of his master,

carry goods for hire on his own account, and that fact be known to the person who employs him, the action should be against the driver, and not the master; but if the driver be only a servant, the action must be brought against the master, and him only. This is a general rule, wherever the act of the servant can be considered as the act of the master. (Williams *v.* Cranston, 2 Stark. N. P. C. 82. See Cavenagh *v.* Such, 1 Price R. 328. Middleton *v.* Fowler, Salk. 282. Bull. Nisi Prius, 70 b. Bridgeman's ed.)

Declaration.

In a declaration against a common carrier, it was formerly usual to set out the custom of the realm, (1 Sid. 245. Hearn's Plead. 76. Vid. Ent. 37, 38;) but, as this custom is part of the common law, and judicially recognised by the courts, it is not only unnecessary, but it is better omitted, because it tends to confound the distinction between special customs, which ought to be pleaded, and the general custom of the realm, of which the courts are bound to take notice without pleading. (Per Dennison, J. in Dale *v.* Hall, 1 Wils. 282. Ca. Temp. Hard. 199. Hargrave's Co. Litt. 89. a. *n.*)

The declaration must allege a duty or contract, and therefore a count in an action upon the case which stated a shipment by the plaintiff, of goods on board a vessel of which the defendants were owners, without proceeding to state that the goods were delivered or received by the defendants, so that they had no notice of the fact, is not sufficient. A promise must be alleged, or circumstances and facts stated, from whence a promise could be implied by the one party to the other, or duty inferred between them in respect to such goods. (Max *v.* Roberts, 12 East, 89.)

In the statement of the contract, it must be set forth so as to correspond with the facts proved in evidence, and any material variance will be fatal. (Roskell *v.* Waterhouse, 2 Stark, N. P. C. 461.) But as a general notice does not constitute a special contract, or in any way qualify the contract itself, it need not be stated upon the record; a declaration in the usual form will, in cases of this description, be sufficient. The proper office of such notice is to limit the province of the jury in the assessment of damages, after a right to them has accrued by a breach of the contract. (Clarke *v.* Gray, 6 East, 564. Smith *v.* Horne, 8 Taunt. 146.)

The *termini* of the journey must also be accurately stated, for, where the contract was represented in the declaration to be for the conveyance of goods from Whitechapel, in the county of Middlesex, to Thornden, in Essex; when, in fact, it was from Aldgate, in the city of London, to that place, the variance was holden to be fatal. (Tucker *v.* Cracklin, 2 Stark. N. P. C. 385.) See in 2 Show, 129, a note by the reporter as to a mis-statement of the *terminus ad quem*.

Payment of money into court.

Where the demand consists of a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury, the defendant will be permitted to pay money into court. (Hallett *v.* East India Company, 2 Burr. 1120. Tidd's Pract. 5 ed. p. 620. 2 Archbold's K. B. Practice, 181. Hutton *v.* Bolton, 1 H. Bl. 299. n. *b*.) In an action of assumpsit against a carrier for the loss of a trunk belonging to the plaintiffs of the value of 50*l*. the defendant was allowed to

pay 20*l.* into court, upon an affidavit, which stated that he had published an advertisement that he would not be responsible for any parcel committed to his care above the value of 20*l.* unless he was paid in proportion to the risk, and that though the goods lost in the present case exceeded that value, yet he was not informed of it, nor paid any thing extraordinary for the carriage. Mr. Justice Buller observed, that "this was an action of assumpsit; and the goods are stated to have been of a specific value. The declaration does not state any particular damage or inconvenience in consequence of, and independent of the loss; and therefore the plaintiff cannot recover beyond the value of the goods in question; for which reason the declaration does not differ from the common case of goods sold and delivered. (Hutton *v.* Bolton, 1 H. Bl. 299. n. *b.*)

But in assumpsit to recover the loss sustained upon goods put on board of the defendant's barge, and which had been spoiled, in consequence of the barge being sunk; the defendant was not allowed to pay the invoice price into court. (Fail *v.* Pickford, 2 Bos. & Pul. 234.)

The payment of money into court, generally, on the whole declaration, admits the contract as stated in each count, but not the amount of the breach there stated. (Stoveld *v.* Brewin, 2 B. & A. 116. Dyer *v.* Ashton, 6 B. & C. 3.) Nor will it be an admission of other parts of the contract, which are distinct and collateral, respecting the liquidation of damages after a right to them has accrued by a breach of the contract. (Clarke *v.* Gray, 6 East, 564.)

In an action of assumpsit against a carrier for the loss of a trunk of the value of 15*l.*, where the declaration stated a general undertaking by the defendants to carry goods for hire, and the defendant paid 5*l.* into court, the defendant was not allowed to give in evidence a notice "that he would not be responsible for more than 5*l.* for any property lost, unless the same was booked and paid for according to the value," on the ground that the notice containing the restriction was a limitation of the contract, which was admitted by the payment of money into court, and reduced the question to the quantum of damages the plaintiff was entitled to recover. (Yate *v.* Willan, 2 East, 128.) But in the above case of Clarke *v.* Gray, the opinion of the court that the notice operated as an admission of the contract was impeached by the court, and Lord Ellenborough, in delivering judgment, observed, "that the case of Yate *v.* Willan could not be supported to its full extent; for although the payment of money into court did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision, as to the amount of damages to be recovered in case of loss." (See also Cox *v.* Parry, 1 T. R. 464.)

Statute of limitations.

The statute of limitations may be pleaded in bar to an action against a common carrier for fraudulently embezzling goods entrusted to his care. (Cook *v.* Darby, 4 Munf. Rep. 444.)

Evidence on the part of the Plaintiff.

In an action against a carrier for the loss or injury of goods, the plaintiff must prove a delivery to the carrier, or to his servant or agent, so as to charge him with their custody. And where there is any reason to apprehend that the

fact will be disputed, he should also be prepared to prove that the goods were properly packed for the journey. (See Beck *v.* Evans, 16 East, 245.) But the plaintiff will not be required to prove a property in the goods, for if a carrier receive goods to be carried, he cannot retain them, and put the consignor upon proof of his title to them. (Anon. cited and sanctioned by Lord Kenyon, C. J. in Laclough *v.* Towle, 3 Esp. N. P. C. 115.) The material averments in the declaration, and also the terms of the contract, must be proved as they are set forth. (See Roskell *v.* Waterhouse, 2 Stark. N. P. C. 461.)

In a case in which it was alleged, that in consideration that the plaintiff, at the instance of the defendant, had caused to be shipped on board his vessel a quantity of wheat to be delivered, for a reasonable reward, at a certain place by a particular day, and that the defendant undertook to deliver it safely, the plaintiff proved the agreement as stated; but it appeared that the agreement was made before all the wheat was delivered. The court, however, decided that the declaration was supported by the evidence. (Streeter *v.* Horlock, 1 Bing. 34.)

A party who seeks to deprive the carrier of a general notice, must show the particular circumstances upon which he relies for that purpose; for the carrier is not bound to prove that he used reasonable care. (Harris *v.* Packwood, 3 Taunt 34.) But in assumpsit in the usual form, evidence of gross neglect is admissible for this purpose, although the declaration contains no such averment, because the notice not constituting a special contract, does not appear on the record, but only arises in defence of the carrier,

and therefore it may be rebutted by proof of positive negligence. (Smith *v.* Horne, 8 Taunt. 144.)

The entry in the office in Somerset House for licensing stage-coaches, is no evidence to prove that persons named in the license are the owners of the coach. To render such evidence admissible against the coach-master, his signature to the entry, or connection with it in some way or other, must be proved. (Strother *v.* Willan, 2 Camp. 24.)

On the part of the defendant.

A carrier, upon proof of a delivery to him, will be required to show in what manner he has acquitted himself of his engagement, for it is not necessary for the plaintiff to prove negligence, for it is said "every thing is negligence that the law does not excuse." Evidence, therefore, that the loss is not attributable to negligence, on the carrier's part, is inadmissible, for since he is responsible in all cases, except injuries resulting from the act of God, or of the King's enemies, all other causes amounting to negligence not being legal excuses, evidence of them is immaterial, as not being an answer to the undertaking. (Dale *v.* Hall, 1 Wils. 281.) The communication of a notice may be proved by the person by whom it was made, or by the proof of those circumstances from whence a knowledge of its contents may be inferred. A general notice written upon a board which is inlaid in a wall, may be proved by an examined copy. (Cobden *v.* Bolton, 2 Camp. 108 n.)

A usage or custom, varying the liability of common carriers by water, from that of the common law, may be proved. (Gordon *v.* Little, 8 Serg. & R. 533.) But in an action against a common carrier by water, to recover damages for the loss of the plain-

tiff's goods, where the defence is, that carriers by water are, by the custom of the country, answerable for such losses only as are occasioned by their own negligence, the defendant cannot give in evidence, that in a case in which the plaintiff had carried the property of others, he had refused to make compensation for a loss. (Dean *v.* Swoop, 2 Binn. R. 72.)

A party interested in the establishment of a particular fact, will not in general be admitted to prove it; but among others, an exception in favour of trade has been allowed. "A party interested, will be admitted for the sake of trade and the common usage of business, therefore a porter shall be evidence to prove a delivery of goods." (Bull. N. P. 289. Theobold *v.* Tregott, 11 Mod. 262.) A servant consequently is a good witness to prove a delivery of goods to a carrier. (See Buckman *v.* Levi, 4 Camp. 414.) So a book-keeper to a carrier is a good witness for him, of necessity, without a release, to prove the delivery of a parcel. (Spencer *v.* Goulding, Peake, N. P. C. 129.) But a promise by him to make compensation for a parcel which had been lost, is not binding upon the carrier, without proving that he was his general agent. (Olive *v.* Eames, 2 Stark. N. P. C. 181.)

A servant is not a competent witness in an action against his master, to disprove the fact of his negligence, and, therefore, the driver of a coach, or the master of a vessel, are not admissible on the part of the owner for that purpose, because the servant is interested to defeat the action, since a verdict against the master might be given in evidence in an action by him against the servant as to the quantum of

damages. (Green *v.* The New River Company, 4 T. R. 589. Bird *v.* Thompson, 1 Esp. N. P. C. 339. 5 Esp. N. P. C. 73.) In cases of this description, the servant must be released by the master before his evidence can be received. (Per Lee, C. J., in Jervis *v.* Hayes, 2 Str. 1083. Miller *v.* Falconer, 1 Camp. N. P. C. 251.,) but a release by one of several joint owners of a vessel will be sufficient, for the action against the captain for negligence must be joint; in which case a release by one would be pleadable in bar to the joint action. (Hockless *v.* Mitchell, 4 Esp. N. P. C. 86.)

In an action on the case for managing the defendant's vessel so negligently that it ran down the plaintiff's barge, the declaration set forth that he was possessed of the said barge, laden with divers goods and merchandizes, and Holt, C. J. would not suffer the pilot to be a witness, because he was answerable, if faulty in steering, to the master; nor would he suffer any damages to be recovered for the goods because they were not properly set forth. (Martyn *v.* Hendrickson, 1 Salk. 287.) So, in an action on a policy of insurance on the plaintiff's goods, the owner of the vessel is not a competent witness, without a release, to prove that the vessel was staunch and seaworthy, for otherwise he would be liable on his implied warranty that the vessel was staunch, and therefore he comes to exonerate himself. (Rotheroe *v.* Elton, Peake, N. P. C. 84.) But, in an action against the owner of a vessel for not safely carrying corn, the plaintiff called the master to prove that the injury arose on account of the vessel not being sea-worthy; Lord Kenyon, C. J. admitted him, observing, that the

witness had no immediate interest; the record in this cause would not be evidence for or against him; and, if it should turn out that the ship was lost by the negligence of the master, still the present defendant is liable to the plaintiff; therefore, taking it either way, he is a witness. (Lay *v.* Holock, Peake, N. P. C. 101.) And, in an action for sinking a barge, on board of which the plaintiff had a cargo of corn, the master may be a witness upon being released, to prove negligence on the defendant's part, because the record in this cause would not be evidence for the master in an action against the defendant for the injury done to the barge. (Spitty *v.* Bowen, Peake, N. P. C. 53.)

A carrier, employed by A. to carry a sum of money to B. and then the like sum to C., in an action for money had and received by A. against C., is a good witness from necessity, without a release, to prove that by mistake he delivered the first sum to C. as well as the second. (Barker *v.* Macrae, 3 Camp. 144.)

Damages. In an action against a carrier by water, the value of the goods at the port of reception is the proper measure of damages, unless some fault or misconduct on the part of the carrier should require the application of a different rule. (Edminson *v* Baxter, 4 Hayw. Rep. 114.)

The reader is further referred to the Treatise of Judge Story, (Bailm. 317—387,) for a luminous and able analysis of the modern law of carriers both in England and America.

THE CARRIERS' ACT.

11 GEO. 4 & 1 GUL. 4, c. 68.

An act for the more effectual protection of mail-coach contractors, stage-coach proprietors, and other common carriers for hire, against the loss of, or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.

I. Whereas, by reason of the frequent practice of bankers and others sending by the public mails, stage-coaches, wagons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased: And whereas, through the frequent omission by persons sending such parcels and packages to notify the value and contents thereof, so as to enable such mail contractors, stage coach preprietors and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with the knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; Be it therefore enacted by the King's most excellent Majesty, and by and with the advice and consent of the Lords

Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That, from and after the passing of this act, no mail contractors, stage-coach proprietors, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, and securities for the payment of money, English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, gold or silver plate, or plated goods, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in the parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as afore-

said, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package.

II. And be it further enacted, That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed ten pounds, it shall be lawful for such mail contractors, coach proprietors, and other common carriers, to demand and receive an increased charge to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charges required to be made over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office, shall be bound by such notice, without further proof of the same having come to their knowledge.

III. Provided always, and be it further enacted, That when the value shall have been so declared, and the increased rate of the charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the pack-

age or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and, if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate or charge.

IV. Provided always, and be it further enacted, That from and after the first day of September, now next ensuing, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any way affect the liability at common law of any such mail-contractors, stage-coach proprietors, and other common carriers as aforesaid, for or in respect of any articles or goods to be carried or conveyed by them, but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall, from and after the first day of September, be liable as at the common law, to answer for the loss of, or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

V. And be it further enacted, That, for the purposes of this act, every office, warehouse, or receiving-house which shall be used or appropriated by any mail contractor, or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving

of parcels to be conveyed as aforesaid, shall be deemed and taken to be the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued in his, her, or their names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor, or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid.

VI. Provided always, and be it further enacted, That nothing in this act contained, shall extend or be construed to annul or in any wise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandizes.

VII. Provided also, and be it further enacted, That where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

VIII. Provided also, and be it further enacted, That nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever

arising from the felonious acts of any coachman, guard, book-keeper or porter, or other servant in his or their employ; nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

XI. Provided also, and be it further enacted, That such mail-coach contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid; but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence; and that the mail-coach contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as aforementioned.

X. And be it further enacted, That, in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss or injury of any goods delivered to be carried; whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

XI. And be it further enacted, That this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

Coggs *v.* Bernard.(*a*)

[*Trinity Term, 2 Annæ Reginæ.*]

Holt, Chief Justice.—The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that, for want of care in him, some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

If a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But, upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And (*b*) there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor; and this I call a *depo-*

(*a*) For a statement of the case vide Jones, ante, p. 58. S. C. 2 Ld. Raym. 909; Com. 133; Salk 26; 3 Salk. 11; Holt. 13; Entry, Salk. 735; 3 Ld. Raym. 163.

(*b*) Vide Jones, ante 35; 2 Ld. Raym. 913.

situm: and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful, are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in *specie.* The third sort is, when goods are left by the bailee to be used by him for hire; that is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, vadium; and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

Commodatum.

Pawns.

Things to be carried, &c. for a reward.

To be carried without a reward.

A man who receives goods to keep gratis for the use of the bailor is not answerable for their loss or for

As to the(c) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stolen without any fault in him, neither will a common neglect make him chargeable; but he must be guilty of some gross ne-

(c) Vide Jones, ante, 36.

glect. There is, I confess, a great authority against me, where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But(*d*) my Lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For, if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But, according to this doctrine, the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrince, to show an undisturbed rule and practice of the law according to this position. But, to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show, that there never was any such resolution given before Southcote's case. The 29th Ass. 28, is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stolen. As for 8 Edw. 2, Fitz. Detinue, 59, where goods were locked in a chest, and left with the bailee,

any damage they may sustain, unless he was guilty of some gross neglect with respect to them. Vide Str. 1099. Nor even then, if he was guilty of the same neglect with respect to his own. D. acc. 2 Ld. Raym. 655. Semb. acc. Burr. 2300.

(*d*) Vide 2 Ld Raym. 655; Jones, ante, 41.

and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods: that case, they say, differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For, the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40 b. was but a debate at bar. For, Danby was but a counsel then, though he had been chief justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. 7. 4, is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always, at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. Though I must confess reason is strong againt the case to charge a man for doing such a friendly act for his friend; but,

so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For, if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for, the keeping them as he keeps his own, is an argument of his honesty. A fortiori he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3. c. 2. 99 b. J. S. apud quem res deponitur, re obligatur et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare. As, suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for, there it is said, Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet. So

wherever the borrower would be.

to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62. b. Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis, ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis, adhiberet, nisi talem adhibuerit, de qua superius dictum est.—From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (*e*) bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., vadium, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (*f*) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using the (*f*) pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril; for whereas, if she keeps them locked up in

If a pawnee use the pawn about the keeping of which he is at no charge, he is answerable at all

(*e*) D. acc. 2 Ld. Raym. 1087.
(*f*) S. P. 3 Salk. 268. Holt. 528. Salk. 522.

her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompense for the meat. As to the second point, Bracton 99. b. gives you the answer—Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere.—In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and, notwithstanding the loss, yet he shall resort to the pawner for his debt. Agreeable to this is 29 Ass. 28. and Southcote's case. But indeed the reason given in Southcote's case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the

events for any loss or damage which may happen with respect to it while he is using it. S. P. 3 Salk. 268. Holt, 528. Salk. 522.

The pawnee of goods is responsible for any loss or damage with respect to the pawn while he is warranted in detaining it, if it was occasioned by his negligence; otherwise he is not. S. P. 3 Salk. 268. Salk. 512.

But he is answerable

at all events for any loss or damage which happens after he ought to have returned the pawn. S. P. 3 Salk. 268. Holt. 528. Salk. 522. Vide 2 Ld. Raym. 735. Jones, 79.

goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.(*g*)

A man that keeps goods by wrong is at all events answerable for their loss or damage.

As to the fifth sort of bailment, viz. a delivery to carry, or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. which case, of a master of a ship, was first adjudged 26 Car. 2, in the case of Mors *v.* Slew, Raym. 220, 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king.(*h*) For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of

If goods are delivered to a person in a public employment, for a purpose in respect of which he is to have a reward, he is answerable for any loss or damage which is not occasioned by the act of God or the King's enemies. S. P. Holt, 131, R. acc. 1

(*g*) Jones, p. 52, n. 22.

(*h*) This has been altered by statute. See ante, Appx. p. 107.

undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c. it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in other cases, by reason of the necessity of the thing. The same law of a factor.

Wils. 281. Barclay v. Yann, B. R. E. T. 24 G. 3. Trent and Mersey Company v. Wood, B. R. E. T. 25 G. 3, 1 T. R. 27. Vide 2 Ld. Raym. 264. Str. 128. Burr. 2300, 2827. Jones, 103. A bailiff or factor, though he is to have a reward, is not answerable for any loss or damage which was not occasioned or facilitated by his neglect. S. P. Holt, 131. Vide 1 Vent. 121. 2 Lev. 5. Jones, 97.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods and having managed them ill, and so by his neglect a

A man to whom goods are delivered for a purpose in respect of which he is to have no reward, is not answerable for any loss or damage occasioned

by a third person.

damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100. it is called mandatum. It is an obligation which arises ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his Commentaries upon Justinian, lib. 3. tit. 27. 684. defines mandatum to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton, ubi supra, says, contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis. I don't find this word in any other author of our law besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

Case lies for negligently executing a gratis commission. Vide 1 H. Bl. 158.

The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily is a good ground for an action.(*i*) 1 Roll. Abr. 10; 2 Hen. 7, 11; a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because, when the party has taken upon him to keep

A breach of a trust undertaken voluntarily is a good ground for an action. Vide Jones, 54, 55.

(*i*) 2 Ld. Raym. 911.

the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the(*k*) defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 Hen. 6, 49; and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain.(*l*) There has been

(*k*) Vide Jones, 56, 57, 61. (*l*) 2 Ld. Raym. 920.

If a man promises to re-deliver goods in consideration of having them delivered to him, an action will lie against him for not re-delivering them.

a question made, if I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said, by the judges, to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21 Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so, a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case Mors *v.* Slew was drawn by the greatest drawer in England at that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. Judgment for the plaintiff.

INDEX

TO THE

PRINCIPAL MATTERS.

THE END.